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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1453

NEAL R. WOOLEY, individually and as Chief of Police, Lebanon, New Hampshire; PAUL A. DOYON, individually and as Director of the New Hampshire State Police; FREDERICK N. CLARKE, JR., individually and as Commissioner of the New Hampshire Department of Motor Vehicles,
APPELLANTS

V.

GEORGE MAYNARD and MAXINE MAYNARD,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

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APPELLANTS

v.

GEORGE MAYNARD and MAXINE MAYNARD,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

The Appellants appeal from the judgment of the United States District Court for the District of New Hampshire, entered on January 9, 1976, holding unconstitutional a statute of the State of New Hampshire

and granting injunctive relief to the Appellees, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the District of New Hampshire, rendered on January 9, 1976, by a three-judge District Court, is not yet reported. A copy of that opinion is attached hereto as Appendix A.

GROUNDS OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1253, this being an appeal from an order of a three-judge District Court granting, after notice and hearing, a permanent injunction in a civil action. The action was instituted by the Appellees pursuant to 42 U.S.C. §1983, seeking declaratory and injunctive

relief against the enforcement of a statute of the State of New Hampshire on the grounds of its unconstitutionality. The action, therefore, was required to be heard and determined by a District Court of three judges, pursuant to 28 U.S.C. §2281.

The Appellants seek review of the order of the three-judge District Court, entered on January 9, 1976, holding unconstitutional New Hampshire RSA 262:27-c (supp), which makes it a misdemeanor to obscure the words "Live Free or Die" on New Hampshire State license plates. Timely notice of appeal to this Court was filed with the United States District Court for the District of New Hampshire on February 13, 1976. A copy of the Notice of Appeal is attached hereto as Appendix B.

As the three-judge District Court held unconstitutional New Hampshire RSA 262:27-c (supp) and granted injunctive relief, this matter is appropriately brought to this Court by appeal pursuant to 28 U.S.C. §1253. Loeb vs. Trustees of Columbia Township, 179 U.S. 472 (1900) (constitutionality); Sixty-Seventh Minnesota State Senate vs. Beens, 406 U.S. 187 (1972) (constitutionality and injunctive relief); St. John vs. Wisconsin Employment Relations Board, 340 U.S. 411 (1951) (injunctive relief).

This case involves the First and Fourteenth Amendments of the Constitution of the United States and New Hampshire. RSA 262:27-c (supp) and 263:1 (supp), which are set forth in Appendix C.

QUESTIONS PRESENTED

I. WHETHER FEDERAL INTERVENTION IN A STATE CRIMINAL PROCEEDING IS PRECLUDED WHERE THE DEFENDANT THEREIN HAS HAD A FULL OPPORTUNITY TO UTILIZE STATE APPELLATE REMEDIES AND HAS FAILED TO DO SO.

II. WHERE, CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE STATE OF NEW HAMPSHIRE MAY PROHIBIT BY CRIMINAL SANCTION THE KNOWING OBSCURATION OF THE WORDS "LIVE FREE OR DIE" ON NEW HAMPSHIRE MOTOR VEHICLE LICENSE PLATES.

STATEMENT OF THE CASE

The Appellees, George and Maxine Maynard, are husband and wife and residents of Claremont, New Hampshire. They own two non-commercial motor vehicles, a 1971 Toyota and a 1968 Plymouth, both of which are registered in the State of New Hampshire. Pursuant to New Hampshire RSA 263:1 (supp), four non-commercial motor vehicle license plates which bear the State Motto "Live Free or Die" were issued to the Appellees for their motor vehicles. In March or April of 1974, the Appellees began placing non-transparent tape over the State Motto, and in May or June of that same year, Mr. Maynard punched out the words "or Die" on all four license plates, covering the resulting holes, as well as the words "Live Free," with non-transparent tape.

On November 27, 1974, Mr. Maynard was charged by a Lebanon, New Hampshire District

Court complaint with having committed the misdemeanor offense of Misuse of Plates, contrary to New Hampshire RSA 262:27-c (supp), in that he knowingly attached to one of his motor vehicles license plates having been duly issued by the State Director of Motor Vehicles, but on which he knowingly had obscured or permitted to be obscured the words "Live Free or Die." Mr. Maynard was found guilty by the Lebanon District Court on December 6, 1974, and was ordered to pay a fine of $25.00, which fine was suspended. Mr. Maynard did not appeal this conviction.

By a Lebanon District Court complaint dated December 28, 1974, Mr. Maynard was charged with a second violation of New Hampshire RSA 262:27-c (supp). He was found guilty on January 31, 1975, was sentenced to pay a fine of $50.00 and was ordered sentenced to the Grafton County,

New Hampshire House of Correction for six months, which imprisonment was suspended. Mr. Maynard again did not appeal the conviction and, moreover, advised the District Court that he would refuse to pay the fines, now totalling $75.00, as a matter of conscience and not due to an inability to pay. The District Court then ordered that Mr. Maynard be committed to the House of Correction for fifteen days. Mr. Maynard served his sentence and was released on February 15, 1975.

Prior to his trial on the second complaint, Mr. Maynard was charged on January 3, 1975, with a third violation of New Hampshire RSA 262:27-c (supp). He was found guilty by the Lebanon, New Hampshire District Court on January 31, 1975, but the case was continued for sentence. Again, Mr. Maynard failed to appeal his conviction.

In his defense at the time of trial of each complaint, Mr. Maynard argued that his acts with respect to the license plates were the result of his personal religious convictions.

On March 4, 1975, the Appellees filed with the United States District Court for the District of New Hampshire a civil complaint for declaratory and injunctive relief, naming as defendants the Appellants herein, Neal R. Wooley, individually and as Chief of Police, Lebanon, New Hampshire; Paul A. Doyon, individually and as Director of the New Hampshire State Police; and Frederick N. Clarke, Jr., individually and as Commissioner of the New Hampshire Department of Motor Vehicles. Alleging that both New Hampshire RSA 263:1 (supp) and New Hampshire RSA 262:27-c (supp) are unconstitutional, the Appellees sought preliminary and permanent injunctive relief restraining

the Appellants from enforcing the provisions of said statutes. By amended complaint dated March 7, 1975, Appellees requested further that a three-judge District Court be convened pursuant to 28 U.S.C. §2281. On March 11, 1975, United States District Court Judge Hugh H. Bownes issued a temporary restraining order against the Appellants and granted the Appellees' request for the convening of a three-judge District Court. Thereafter, briefs were submitted by the parties and on September 22, 1975, the three-judge District Court held an evidentiary hearing and heard oral arguments. The decision of the Court was rendered and entered on January 9, 1976.

QUESTIONS PRESENTED ARE SUBSTANTIAL

The opinion of the three-judge United States District Court, holding unconstitutional New Hampshire RSA 262:27-c (supp) as applied in this case, presents questions so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution by this Court.

I. Whether federal intervention in a state criminal proceeding is precluded where the defendant therein has had a full opportunity to ulitize state appellate remedies and has failed to do so.

The importance of the first question raised in this case derives from the historical and fundamental policy against federal interference with the criminal processes of state courts. Younger vs. Harris, 401 U.S. 37 (1971). Appellee Mr. Maynard was prosecuted within a state court for three separate and distinct violations of the same state criminal

statute. In each case he based his defense upon the First Amendment, which defense expressly raised the issue of the constitutionality of the state statute. (Transcript of three-judge Court, p. 22). In each case his defense was found by the Trial Court to be without merit. Under the two-tier trial system of New Hampshire, Appellee Mr. Maynard in each case had either the absolute right to appeal and a trial de novo. (New Hampshire RSA 502-A:11; State vs. Handfield, 115 N.H. ____, 348 A.2d 352 (1975)) or the right to request the Trial Court to reserve and transfer to the New Hampshire Supreme Court any issues of constitutional law raised by him in the Trial Court. (New Hampshire RSA 502-A:17-a (supp)). However, on three separate occasions he elected not to avail himself of either remedy and the attendant opportunities to renew his constitutional claims. His failure to exhaust

his state appellate remedies precludes federal intervention. Huffman vs. Pursue, Ltd., 420 U.S. 592 (1975); Kugler vs. Helfant, 421 U.S. ____, 44 L. Ed. 2d 15 (1975). Intervention such as that which occurred in the instant case not only acts to nullify the prior state court proceedings, but also constitutes a collateral attack upon the state court convictions. Cardillo vs. Zyla, 486 F.2d 473 (1st Cir. 1973). And where the subject matter of the instant case relates to the entire motor vehicle registration system of the State of New Hampshire, the principles of equitable restraint and comity deserve the strictest adherence.

II. Whether, consistent with the First and Fourteenth Amendments of the United States Constitution, the State of New Hampshire may prohibit by criminal sanction the knowing obscuration of the words "Live Free or Die" on New Hampshire motor vehicle license plates.

Approximately 325,000 motor vehicle license plates currently issued by the State of New Hampshire bear by legislative act the State Motto, "Live Free or Die." (Transcript, p. 57). The placement of these words upon license plates serves not only in part to designate a motor vehicle as being registered in this State, but also, pursuant to the motor vehicle registration system of this State, purposely functions as a means of identification of a particular class or use of motor vehicles. (Transcript, p. 63, pp. 68-71). The placement of the State Motto on license plates also serves to foster appreciation of State history and tradition, to create State pride, identity and individualism,

and to promote tourism, the latter being the largest source of financial revenue to New Hampshire. All these purposes clearly are within the police power of a state. Halter vs. Nebraska, 205 U.S. 34, 31, 51 L. Ed. 696, 701 (1907). And New Hampshire RSA 262:27-c (supp), which makes it an offense to obscure any portion of a duly issued license plate, is a reasonable manner of promoting the State's general welfare and of sustaining a substantial governmental interest, that is, a uniform system of motor vehicle registrations and identification. State vs. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972).

In holding this statute unconstitutional as applied, the three-judge Court below relied upon Spence vs. Washington, 418 U.S. 405 (1974), and Tinker vs. Des Moines Independent Community School District, 393 U.S. 503 (1969). Likening

the obscuration of the words on a license plate to the taping of a peace symbol on a flag in Spence, the Court below discovered symbolic speech. The analogy fails. While the conduct in Spence and Tinker derived its communicative quality from the then emotional Vietnam conflict and further in Spence from the object of the conduct, i.e., the flag, the conduct of the Appellees herein was not undetaken against any background which gave it meaning and, moreover, was directed upon an object having not only an ambiguous meaning, but also symbolic significance far less than that of the flag. Contrary to the implication of footnote 11 of the Opinion below, there is no evidence in the record of individuals other than the Appellees, since State vs. Hoskin, supra, engaging in similar conduct. This, coupled with the ambiguity of the meaning of the State Motto, causes an observer of the conduct of

the Appellees to reach no interpretation other than that of "bizarre behavior" (Spence, supra, p. 410) in the realm of that "apparently limitless variety of conduct (which cannot) be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States vs. O'Brien, 391 U.S. 367, 376 (1968). The Court below acknowledged that "the act of covering the motto on a license plate may, in some cases, be an act of pure whimsy." Such an act is essentially just that - "pure whimsy," and the crucial distinction between such "bizzare behavior" or "pure whimsy" and constitutionally protected symbolic speech escaped the Court. The meaning of a symbolic act must be that which is communicated at the moment of the act and it is error to permit a whimsical act subsequently to be imbued with meaning by the

testimony of the actor. Such a post facto effort to give a communicative quality to an otherwise uncommunicative act cannot trigger First Amendment protection. By their conduct the Appellees clearly did not communicate "fundamentalist religious beliefs that death is an unreality for a follower of Christ and, to a lesser extent, that it is wrong to give up one's earthly life for the state, even if the alternative is living in bondage." (Opinion below). Neither can it be said that the Appellees communicated a "strong disagreement with implications of the message" (Opinion below) since the message of the State Motto is ambiguous. There was no "particularized communication" and no great likelihood of any message being understood. Spence, supra, p. 411.

Any ideas intended to communicated by the Appellees at the moment of their conduct were particularized from the witness stand eighteen months after their conduct. (Transcript, p. 10f).

A majority of the states utilize motor vehicle license plates bearing state mottoes or other slogans, for example: North Carolina: "First In Freedom"; Oklahoma: "Oklahoma Is OK"; Nebraska: "Cornhusker State"; Wisconsin: "Dairyland". (Defendants' Exhibit No. 7, below). The substantial importance of the issues raised in this case, therefore, is not restricted to New Hampshire, but is of general importance, affecting the motor vehicle registration systems in numerous states. (See, e.g., Froslid vs. Hults, 248 N.Y.S.2d 676, 20 A.D.2d 498, appeal dismissed 199 N.E.2d 166, 14 N.Y.2d 722, 250 N.Y.S.2d 68 (1964)). To permit the opinion of the Court

below to stand will jeopardize established state uniform motor vehicle registration systems. It also logically will tend to affect adversely analogous situations such as the establishment of the national monetary system by nullifying the offense of mutilation of national coins or currency by obliteration of the national motto, "In God We Trust", or the Latin phrase "e pluribus unum". 31 U.S.C.A. s. 324(a) (supp); 18 U.S.C.A. ss. 331, 333; see: Engel vs. Vitale, 370 U.S. 421, 440 n. 5, 8 L. Ed. 2d 601 n. 5 (1962).

CONCLUSION

It is respectfully submitted that the two constitutional questions presented are substantial, are of general importance, and that this Court should note probable jurisdiction and set the matter for briefs on the merits and oral argument.

Respectfully submitted,

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APPENDIX A

OPINION OF THE
UNITED STATES DISTRICT COURT,
DISTRICT OF NEW HAMPSHIRE

GEORGE MAYNARD and
MAXINE MAYNARD,

Plaintiffs,

v. Civil Action No.
75-57

NEAL R. WOOLEY, individually
and as Chief of Police,
Lebanon, New Hampshire,
et al.,

O P I N I O N

COFFIN, Chief Judge. This is an action instituted pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief against the enforcement of NHRSA 262:27-c, which makes it a crime to obscure the words "Live Free or Die" on New Hampshire state license plates. Plaintiffs, George and Maxine Maynard -- both Jehovah's Witnesses -- state that they have political and religious objections to operating a motor vehicle which displays this motto, and they contend that the enforcement of the New Hampshire statute against them is contrary to the First and Fourteenth Amendments of the United States Constitution. George Maynard has, on three occasions in the past, been arrested, prosecuted, and convicted for violating the statute in question. The plaintiffs seek a declaratory judgment that, as applied to them, NHRSA 262-27-c is contrary to the United States

Constitution, an injunction against any future arrests and prosecutions, and an injunction requiring that, in future years, they be issued plates that do not contain the motto "Live Free or Die". The single district judge granted plaintiffs' prayer for a temporary restraining order enjoining future arrests and prosecutions. Because the action seeks an injunction against the enforcement of a state statute on the grounds of its unconstitutionality, a three-judge court was convened pursuant to 28 U.S.C. § 2281.

Since 1969, NHRSA 263:1 has required that all number plates for non-commercial vehicles, with some exceptions, shall have the state motto "Live Free or Die" embossed on them.[1] NHRSA 262:27-c (Supp. 1973), makes it a misdemeanor knowingly to obscure

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1. The New Hampshire state motto, which is reminiscent of the words of Patrick Henry -- "[B]ut as for me, give me liberty or give me death." -- derives from the words of Major General John Stark, reputed to have been written in 1809 as part of a toast in a letter to former comrades-at-arms: "Live free or die; death is not the worst of evils." Moore, A Life of General John Stark of New Hampshire 500 (1949). New Hampshire adopted "Live Free or Die" as its state motto in 1945, and in 1969, it passed a law requiring that, as of 1971, the motto must appear on most non-commercial plates.

the figures or letters on the license plates, and under New Hampshire law, the "letters" include the state motto. State v. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972).[2]

The plaintiffs own two automobiles. Beginning in March or April, 1974, they began covering the "Live Free or Die" on their license plates with tape -- usually reflective red tape. Beginning in late 1974 Mr. Maynard was arrested three times for violating NHRSA 262-27-c. His first arrest took place on November 27, 1974. He appeared in Lebanon District Court pro se on December 6, 1974 at which time he explained that he had religious objections

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2. In Hoskin, the New Hampshire Supreme Court held that NHRSA 262-27-c is not repugnant to either the due process clause or the First Amendment of the federal Constitution. In Hoskin, unlike the case at bar, the appellants did not contend that the act of covering the motto constituted symbolic speech that is protected by the First Amendment. Their First Amendment argument, which the New Hampshire Supreme Court rejected, was that the statute in question penalized them for exercising the right, recognized in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), to be free from a required affirmation of belief.

to displaying the motto on his license plate.[3] The court found him guilty and fined him $25, but suspended the fine during "good behavior". On December 28, 1974, Mr. Maynard was issued his second summons, and on January 31, 1975, he again appeared in court pro se. He was found guilty, fined $50, and sentenced to the Grafton County House of Corrections for six months. The court suspended the prison sentence. After trial, Maynard advised the court that he would have to refuse to pay the fines, which totalled $75, as a matter of religious conscience. The court then ordered him committed to the House of Corrections for a period of fifteen days. Prior to his incarceration, Mr. Maynard had on January 3, 1975 received his third summons for violating the statute. He was also found guilty by the court of this offense on January 31, 1975, but sentencing was continued. At oral argument, counsel for the state defendants informed us that, in this context, "continued for sentencing" is a final sentence under New Hampshire law. No collateral consequences will attach as

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3. Mr. Maynard states that his religious objection to displaying the state motto is that "[b]y religious training and belief, [he] believe[s] that [his] government -- 'Jehovah's Kingdom' -- offers everlasting life. It would be contrary to that belief to give up [his] life for the state, even if it meant living in bondage." He refuses to be coerced by the state to advertise a slogan which he finds morally, ethically, religiously, and politically abhorrent. Maxine Maynard testified that she shares her husband's views.

a result of it unless Mr. Maynard is arrested and prosecuted for the violation of NHRSA 262:27-c at some time in the future.[4]

I. The Applicability of the Doctrine of Equitable Restraint

The state defendants contend that we are precluded from considering the constitutional merits of plaintiffs' claim by the doctrine of equitable restraint of Younger v. Harris, 401 U.S. 37 (1971). We disagree. Younger held that, in all but the most exceptional circumstances, a federal court should refuse to enjoin an ongoing criminal prosecution. Here, however, plaintiffs do not seek to enjoin a pending criminal prosecution. Their primary objective is to obtain declaratory and injunctive relief against future arrests and prosecutions. It is well established that where a federal plaintiff desires protection against threatened state prosecution of a constitutionally protected course of conduct in which he proposed to engage, a federal court can grant equitable relief. Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (preliminary injunction); Steffel v. Thompson, 415 U.S. 452 (1974) (declaratory judgment). We believe that where, as here, the federal plaintiffs assert that enforcement of state laws against them would violate their First and Fourteenth Amendment rights and where, as here, state officials fully intend to

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4. The time for appeal from Mr. Maynard's convictions had expired before plaintiffs filed the present action on March 4, 1975.

enforce those laws, it is entirely appropriate that this court entertain plaintiffs' claim for injunctive relief.[5]

Defendants do not dispute that the Younger doctrine permits federal injunctive relief against threatened arrests and prosecutions. Rather, they contend that Mr. Maynard is barred by his failure to appeal any of his three state convictions. For this proposition, they rely upon Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). There, the Court held that the federal plaintiff was barred because it had chosen not to avail itself of its state appellate remedies, but, instead, had instituted suit in the federal court to obtain relief from a state court judgment. See also Ellis v. Dyson, 421 U.S. 426, 439-43 (1975) (Powell, J., dissenting). Huffman, however, is readily distinguishable. Huffman, like Younger, was a case in which granting the requested injunctive relief would have interfered with the processes of the state court by nullifying prior or pending state court proceedings. Here, no such interference can result. Plaintiffs are not collaterally attacking Mr. Maynard's

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5. The court finds, as the state defendants concede, that both plaintiffs are under a sufficient threat of prosecution to present a justifiable controversy. See Steffel v. Thompson, supra at 459; Younger v. Harris, supra at 42.

state court convictions.[6] The relief they seek is purely prospective. Therefore, neither Younger nor Huffman requires that we stay our hand; indeed, since plaintiffs have demonstrated that they will suffer irreparable harm if we do not intervene and have stated a substantial constitutional claim, it is our responsibility to hear the case. Cf. Zwickler v. Koota, 389 U.S. 241, 247-48 (1967).

Even if the doctrine of equitable restraint barred Mr. Maynard's suit, we would still have to consider whether it bars Mrs. Maynard's action. She has an ownership interest in the Maynard family cars and, accordingly, is under a separate threat of prosecution. Cf. Steffel v. Thompson, supra at 459. This is not a situation "in which legally distinct

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6. A more plausible position for defendants to take would be that Mr. Maynard's state convictions bar litigation of the federal constitutional issues. Although more plausible, this argument too fails. The first circuit has held that a state criminal conviction will have a preclusive effect in a federal civil rights action only with respect to matters actually litigated and decided at the state criminal trial. Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909 (1975). Since the constitutionality of the state statutes was not litigated by Mr. Maynard in the state misdemeanor proceedings, collateral estoppel principles do not preclude this court from considering this issue.

parties are so closely related that they should all be subject to the Younger considerations which govern any of them" Doran v. Salem Inn, Inc., supra at 928. Doran suggested that such a situation might be presented where plaintiffs are brother-sister corporations related "in terms of ownership, control and management". Id. Here, however, each of the Maynards is acting on his or her own independently held religious precepts. There is no suggestion that either controls the actions or beliefs of the other. The relationship between these plaintiffs is thus much closer to that presented in Steffel v. Thompson, supra.[7] In our view, therefore, Mr. Maynard's failure to appeal his state convictions could not bar Mrs. Maynard's federal action for protection from future state criminal prosecution.

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7. In Steffel, two persons engaging in antiwar handbilling outside a shopping center were threatened with state prosecution. One stopped, but the other continued and was arrested and charged with criminal trespass. While this state prosecution was pending, both filed a civil rights action in federal court seeking declaratory relief. The court held that while the one who had been arrested was barred by the Younger doctrine, the other remained free to present his federal claim. See Doran v. Salem Inn, Inc., supra at 928.

II. The Constitutional Merits

Plaintiffs' principal contention is that the New Hampshire statutes cannot be enforced against them consistent with the First Amendment of the federal Constitution, which, of course, is applicable to the states.[8] They maintain that their act of masking over the words "Live Free or Die" is constitutionally immune from state regulation because this act was done to avoid a required affirmation of belief, under the rule of West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); and because their act constituted symbolic speech, as to which New Hampshire cannot demonstrate a sufficient interest to regulate. See Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). Since we accept plaintiffs' contention that their acts constituted constitutionally protected symbolic speech and that the state cannot prosecute them for masking the motto, we need not consider whether their First Amendment right to be free from a required affirmation of belief is implicated.[9]

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8. Plaintiffs also rely upon the due process and equal protection clauses of the Fourteenth Amendment. Because plaintiffs' First Amendment claim is dispositive, we do not address these alternate claims.

9. Judge Bownes would also rest our decision on the ground that NHRSA 262:27-c violates plaintiffs' right to be free from "compelled affirmations of belief".

We begin by identifying the public and private interests that are at stake. Although the act of covering the motto on a license plate may, in some cases, be an act of pure whimsy, it is clear that plaintiffs' act of masking the motto with reflective red tape is motivated by deeply held, fundamentalist religious beliefs that death is an unreality for a follower of Christ and, to a lesser extent, that it is wrong to give up one's earthly life for the state, even if the alternative is living in bondage. Plaintiffs' act of covering the "Live Free or Die" accomplishes two closely interrelated objectives: it relieves them of the burden of displaying a message which offends their beliefs, and, at the same time and more importantly, it communicates their strong disagreement with implications of the message. We have no doubt that plaintiffs' interest implicates the First Amendment. Whatever else may be said about the motto "Live Free or Die", it expresses philosophical and political ideas. Plaintiffs' desire

not to be aligned with these ideas falls within the ambit of the First Amendment.[10]

The state interests promoted by the requirement that New Hampshire passenger cars display license plates bearing this motto are essentially twofold. First, the state believes that the dissemination of the motto and the association of it with New Hampshire serves a number of values: fostering appreciation of state history and tradition; creating state pride, identity, and individualism; and promoting tourism. Second, the presence of the motto on the plates aids in the identification of New Hampshire passenger cars. To permit individuals to mask the "Live Free or Die" on their plates would frustrate the

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10. The defendants contend that the significance of "Live Free or Die" is primarily historical and that the motto is, in any event, so ambiguous that any First Amendment interest plaintiffs assert is de minimis. We do not deny the historical significance of New Hampshire's motto, but this significance is necessarily related to the philosophical and political ideas that have been so important in American history, see note 1 supra, but which plaintiffs are not compelled to endorse. Although the vast majority of, if not all other, state mottoes seem to lack ideological content, "Live Free or Die" has obvious political and philosophical significance for many. The New Hampshire motto may not be as politically charged as other slogans that might be placed on license plates, e.g., "Amnesty Now", but we can conceive of no neutral principle which would permit us to distinguish "Live Free or Die" from such others.

attainment of these objectives. Whether these state interests are sufficient to justify the restriction on plaintiffs' activity will be considered below.

Plaintiffs' contention is that their act of masking the "Live Free or Die" on their license plates constitutes symbolic speech and that the New Hampshire defacement statute, NHRSA 262:27-c, is invalid as applied to them because it is not supported by any state interests that are sufficiently important to justify the restriction of protected expression. We agree.

This claim is based principally on two recent opinions of the United States Supreme Court invalidating state limitations on the exercise of "symbolic speech". In Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court held it a violation of the First and Fourteenth Amendments for public school officials to discipline students for wearing black armbands to school in protest of United States involvement in Vietnam. In Spence v. Washington, 418 U.S. 405 (1974) (per curiam), the Court overturned appellant's conviction for "improper use" of an American flag where, in May, 1970, shortly after the invasion of Cambodia and the shootings at Kent State University, appellant had taped a peace symbol onto an American flag and hung it upside down from his window. See Cline v. Rockingham County Superior Court, 502 F.2d 789 (1st Cir. 1974). In each case, the Court concluded that the claimant's act was sufficiently imbued with the elements of communication to be within

the ambit of the First Amendment and that the state interests relied upon were insufficient to justify the restrictions on the protected expressions.

We are satisfied that plaintiffs' acts of covering the motto "Live Free or Die" constitutes symbolic speech within the meaning of Tinker and Spence. The use of reflective red tape to mask the motto is clearly intended to call attention to the fact that the motto has been obscured and thereby to communicate plaintiffs' disagreement with it. The context of plaintiffs' actions, which is important in determining their communicative quality, see Spence v. Washington, supra at 410, is such that plaintiffs' message is likely to be readily understood. New Hampshire citizens are well aware that the motto "Live Free or Die" appears on the license plates of passenger cars registered in that state, and the likelihood is great that they will interpret plaintiffs' obliteration of the motto as an expression of their conscientious objections to its implications.[11] Since plaintiffs' actions

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11. There is, moreover, evidence in the record that, at least since the decision of the New Hampshire Supreme Court in State v. Hoskin, supra, handed down in 1972, New Hampshire citizens have been generally aware that individuals like the plaintiffs have been covering the "Live Free or Die" on their license plates in order to express their opposition to the motto's implication that political freedom is the greatest good. This consideration supports our conclusion that the likelihood is great that observers will understand the significance of plaintiffs' acts.

are intended as expression and readily perceived as such, we conclude that they are seeking to enjoin "a prosecution for the expression of an idea through activity." Spence v. Washington, supra at 411.[12]

Having found symbolic speech, we now consider the sufficiency of New Hampshire's justifications for the statute. In United States v. O'Brien, 391 U.S. 367 (1968), upholding the respondent's conviction for knowing destruction of his draft card, the Supreme Court developed a four-part test for determining whether a government regulation restricting the freedom of expression protected by the First Amendment is justified. The Court stated, id. at 377:

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12. Defendants contend that it will follow from our holding today that individuals will be free to cover up the mottoes on any state's license plate if they can conceive of some possible political or philosophical opposition to the motto. We reject this suggestion. Plaintiffs have succeeded in establishing that symbolic speech is involved in this case because they have shown not only that they intended to convey a message by their act but also that the message was likely to be understood. They were able to make this latter showing principally because the New Hampshire motto itself possesses obvious political and philosophical significance. We doubt that symbolic speech could be shown in this type of a case when the motto has no such significance.

may perhaps single out certain messages for special protection when they appear on public property, see Spence v. Washington, supra at 408-09, Spence teaches that the governmental interest in preventing individuals from interfering with the communication of the state sponsored message by engaging in symbolic expression is not an interest that meets the third requirement of the O'Brien test. See Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1506-08 (1975). In Spence the Court indicated that the state interest in preventing interruption of the set of messages conveyed by the flag was directly related to the suppression of free expression. 418 U.S. at 412-14 & n. 8. The fact that plaintiffs' act, unlike that of the defendant in Spence, is the only practical alternative to displaying the motto indicates that the statute and the suppression of freedom of expression are even more closely related in the present case than in Spence.

Second, even if the statute's other objective -- requiring that "Live Free or Die" appear on all cars in order to facilitate identification of New Hampshire passenger vehicles -- might be considered unrelated to speech, this purpose clearly fails the fourth requirement of O'Brien: the defacement statute's effect on plaintiffs' First Amendment freedoms is certainly "greater than is essential to the furtherance of that interest". It cannot be seriously contended that the state of New Hampshire has, to use the words of O'Brien, supra at 381, no alternative means that would more precisely and narrowly assure preservation of its interest in

facilitating vehicle identification. Surely it need not structure its system of vehicle identification so that individuals will have to display a motto to which they are philosophically opposed. That the presence of this motto on the license plates is required for identification is belied by the fact that only passenger cars are required to have license plates that contain the motto "Live Free or Die".[13]

Since New Hampshire's interest in the enforcement of its defacement statute is not sufficient to justify the restriction

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13. Defendants suggest that, whatever the merits of placing "Live Free or Die" on the license plates, for the present the motto is needed to distinguish plaintiffs' automobile from automobiles that have no motto on their plates but have the same identification number. However, the state defendants have not shown that any New Hampshire non-passenger motor vehicles have the same identification number as plaintiffs' and there is evidence in the record suggesting that none do. So, even assuming arguendo that this would be a sufficient justification, defendants have not satisfied their burden.

on plaintiffs' constitutionally protected expression,[14] we hold that as applied to plaintiffs NHRSA 262:27-c abridges the rights protected by the First and Fourteenth Amendments.

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14. The fact that defendants have not satisfied the O'Brien test is not necessarily dispositive of the statute's invalidity. See Spence v. Washington, supra at 414 n. 8; Ely, supra at 1496-97. It is implicit in the foregoing discussion, however, that neither of the interests New Hampshire has identified is sufficiently weighty to justify the interference with plaintiffs' protected expression.

Defendants also argue that the New Hampshire defacement statute effects such minimal interference with the values protected by the First Amendment that the state's otherwise insufficient justifications should be deemed sufficient for this case. The core of defendants' submission is that plaintiffs have equally effective alternative means of conveying their message: they could place bumper stickers near the plates which express their disagreement with the motto. We reject this argument. Spence v. Washington, supra, summarily rejected the contention that the free expression claim should fail since it was "miniscule and trifling" in view of the thousands of other available means of disseminating the views. One may not have the liberty of expression in an appropriate place abridged on the ground that the message could be conveyed in an alternative way. 418 U.S. at 411 n. 4. See Cohen v. California, 403 U.S. 15 (1971); Schneider v. State, 308 U.S. 147, 163 (1939).

> "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

We find that the defacement statute fails to meet two of the four components of the O'Brien test. The state has asserted that the statute serves to purposes: facilitating vehicle identification and promoting appreciation of history, state pride, individualism, and tourism. The effectuation of these objectives is within the constitutional power of the state and furthers important and substantial governmental interests. These justifications, however, fail to satisfy the third and fourth requirements of the O'Brien test.

The defacement statute furthers the New Hampshire interest in promoting appreciation of history, state pride, and tourism by preventing individuals from covering over the motto and thereby ensuring the widest possible dissemination of of the message contained therein. This interest is directly related to the suppression of free expression within the meaning of O'Brien. Although a government

III. Relief

For the reasons stated above, defendants are enjoined from arresting and prosecuting plaintiffs at any time in the future for covering over that portion of their license plates that contains the motto "Live Free or Die". Although there is evidence that New Hampshire could easily issue plaintiffs license plates that do not contain the motto -- the state presently manufactures vanity plates to order at a cost of $5 -- we decline to issue an injunction ordering the state officials to do so. The relief we have ordered should fully protect plaintiffs in the exercise of their First Amendment rights, and we would be ill-advised to interfere further with the operation of New Hampshire's system of vehicle identification.

So ordered.

/s/ Frank M. Coffin
U. S. Circuit Judge

/s/ Edward T. Gignoux
U. S. District Judge

/s/ Hugh H. Bownes
U. S. District Judge

Dated at Concord, New Hampshire
on February 9, 1976

JUDGMENT ON DECISION

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

GEORGE MAYNARD and MAXINE MAYNARD	)	
vs.	)	Civil Action No. 75-57
NEAL R. WOOLEY, individually and as Chief of Police, Lebanon, New Hampshire, et al	)	JUDGMENT

This action came on for hearing before the Court, Honorable Frank M. Coffin, Honorable Edward T. Gignoux, and Honorable Hugh H. Bownes, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged judgment in accordance with OPINION entered February 9, 1976.

Dated at Concord, New Hampshire this 9th day of February, 1976.

/s/ William H. Barry, Jr.
Clerk of Court

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

George Maynard and Maxine Maynard	)	
vs.	)	Civil Action
Neal R. Wooley, individually and as Chief of Police, Lebanon, New Hampshire; Paul A. Doyon, individually and as Director of the New Hampshire State Police; Frederick N. Clarke, Jr., individually and as Commissioner of the New Hampshire Department of Motor Vehicles	)	No. 75-57

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Neal R. Wooley, Paul A. Doyon, and Frederick N. Clarke, Jr., the Defendants above-named, hereby appeal to the Supreme Court of the United States from the final order granting declaratory and injunctive relief entered in this action on February 9, 1976.

This appeal is taken pursuant to 28 U.S.C. §1253.

/s/ Robert V. Johnson, II
The State of New Hampshire
Office of the Attorney General
Robert V. Johnson, II
Assistant Attorney General
State House Annex
Concord, New Hampshire 03301
603-271-3671

Counsel for the Defendants
February 13, 1976

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 1976, copies of this Notice of Appeal to the Supreme Court of the United States were mailed, postage prepaid, to Richard S. Kohn, Esquire, 3 Pleasant Street, Concord, New Hampshire 03301, and R. David DePuy, Esquire, 40 Stark Street, Manchester, New Hampshire 03105, counsel of record for the Plaintiffs, and R. Peter Decato, Esquire, National Bank Building, Lebanon, New Hampshire 03066, counsel of record for Defendant Neal R. Wooley. I further certify that all parties required to be served have been served.

/s/ Robert V. Johnson, II
The State of New Hampshire
Office of the Attorney General
Robert V. Johnson, II
Assistant Attorney General
State House Annex
Concord, New Hampshire 03301
603-271-3671

Counsel for the Defendants

APPENDIX C

United States Constitution: First Amendment

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition to government for a redress of grievances."

United States Constitution: Fourteenth Amendment, §1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New Hampshire RSA 263:1 (supp) "Number Plates"

> "Every motor vehicle operated in or on any way in this state shall have displayed conspicuously thereon a number plate or

> "plates to be furnished by the director of the division of motor vehicles. Said director may make special regulations relative to the number of plates, the location of said plate or plates on the vehicle, and the material and design thereof; provided, however, that number plates for non-commercial vehicles shall have the state motto "live free or die" written thereon. The plates shall be kept clean."

New Hampshire RSA 262:27-c (supp) "Misuse of Plates"

> "Any person who knowingly attaches or permits to be attached to a motor vehicle a number plate assigned by the director of any other jurisdiction, to another vehicle or who knowingly obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle or who knowingly and deliberately fails to display on a motor vehicle proper lights, as herein provided, or the number plates and the registration number duly issued therefor shall be guilty of a misdemeanor."

APPENDIX

Supreme Court, U. S.
FILED
AUG 4 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1453

NEAL R. WOOLEY, individually and as
Chief of Police, Lebanon, New Hampshire,
PAUL A. DOYON, individually and as
Director of the New Hampshire State Police, and
FREDERICK N. CLARKE, JR., individually and as
Commissioner of the
New Hampshire Department of Motor Vehicles,

Appellants,

v.

GEORGE MAYNARD and MAXINE MAYNARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT FILED APRIL 12, 1976
PROBABLE JURISDICTION NOTED JUNE 21, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1453

NEAL R. WOOLEY, individually and as
Chief of Police, Lebanon, New Hampshire.
PAUL A. DOYON, individually and as
Director of the New Hampshire State Police, and
FREDERICK N. CLARKE, JR., individually and as
Commissioner of
the New Hampshire Department of Motor Vehicles,
Appellants,

v.

GEORGE MAYNARD and MAXINE MAYNARD,

Appellees.

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CHRONOLOGICAL LIST OF

RELEVANT DOCKET ENTRIES

March 4, 1975	Complaint for Declaratory and Injunctive Relief
March 4, 1975	Motion for Temporary Restraining Order
March 7, 1975	First Amended Complaint for Declaratory and Injunctive Relief
March 7, 1975	Motion to Dismiss
March 7, 1975	Objection to Motion for Temporary Restraining Order
March 11, 1975	Temporary Restraining Order
March 14, 1975	Designation of Three-Judge Court
May 1, 1975	Stipulation of Facts
September 22, 1975	Hearing
February 9, 1976	Opinion
February 9, 1976	Judgment
February 17, 1976	Notice of Appeal to the Supreme Court of the United States

MOTION FOR TEMPORARY RESTRAINING ORDER
Filed March 4, 1975

Plaintiffs move the court to issue a Temporary Restraining Order enjoining the defendants, their agents, servants, employees and all others under their control or in active concert with them, from enforcing the provisions of RSA 262:27-c against them because they have placed tape over the words "Live Free or Die" on their automobile registration plates and to further enjoin the defendants, their agents, servants, employees and others acting in concert with them from removing said number plates from their vehicles and impounding them.

In support whereof plaintiffs aver:

1. Unless the defendants are restrained by this court, the plaintiffs will be deprived of their rights to freedom of expression and the right to be free from coerced belief under the First and Fourteenth Amendments and the equal protection of the laws guaranteed by the Fourteenth Amendment.

2. The continued enforcement of RSA 262:27-c against the defendants for taping over the words "Live Free or Die" on their registration plates will result in irreparable injury, loss and damage to the plaintiffs as more particularly appears from the verified complaint and affidavit of George Maynard, attached hereto.

3. Issuance of a Temporary Restraining Order herein will not cause undue inconvenience, loss or damage to the defendants because Mr. Maynard's registration plates plainly set forth his registration numbers and the name of the State of New Hampshire.

4. On March 3, 1975, the undersigned attorney notified Assistant Attorney General Dave Hess of his intention to seek a Temporary Restraining Order on March 4, 1975. This attorney asked Mr. Hess whether there was any possibility that the State would stipulate that Mr. Maynard could drive his car with the state motto covered until a hearing could be held on plaintiffs' motion for a preliminary injunction. Mr. Hess later called back and said that the plaintiffs would have to seek a Temporary Restraining Order in the federal court.

Dated: March 3, 1975

/s/ Richard S. Kohn
Richard S. Kohn

AFFIDAVIT OF GEORGE MAYNARD

I, GEORGE MAYNARD, having first been duly sworn, on oath depose and say:

1. I am a resident and citizen of Claremont, New Hampshire where I reside with my wife, Maxine, and my two small children.

2. I own two automobiles, a Toyota Corolla and a Plymouth Station wagon. I have registered both automobiles with the New Hampshire Department of Motor Vehicles as required by law.

3. Since 1972, the State of New Hampshire has issued registration plates to me bearing the state motto "Live Free or Die." I am opposed to this slogan on religious and political grounds. First, by religious training and belief, I believe that my "government"—Jehovah's Kingdom—offers everlasting life. It would be contrary to that belief to give up my life for the state, even if it meant living in bondage. Although I obey all laws of the State not in conflict with my conscience, this slogan is directly at odds with my deeply held religious convictions.

4. I also disagree with the motto on political grounds. I believe that life is more precious than freedom. This slogan is a "battle cry" with distinct political overtones. I have read that it was passed by the legislature in 1969 to answer critics of the Vietnam War, replacing the non-political phrase "scenic" New Hampshire to which I have no objection. My act in taping over this offensive language was to express my fundamental disagreement with the jingoistic message it contains. I should like to add that I am an honorably discharged Korean War Veteran and saw combat with the 187th Regimental Combat Team.

5. Beginning in March or April 1974, I placed tape over the motto "Live Free or Die" on the four license plates affixed to my two cars. I did not obscure the numbers or the words "New Hampshire." On November 27, 1974, while driving my Toyota in Lebanon, New Hampshire, I was issued a summons by Officer Hill of the Lebanon Police Department. At that time, he removed the front plate from the car. I was tried and convicted of misuse of plates in Lebanon District Court on December 6, 1974. Chief Neal Wooley of the Lebanon Police Dept. prose-

cuted me. I was fined $25 but the fine was suspended. Judge Lovejoy told me to "go home and behave myself."

6. On or about December 31, 1974, my wife and I drove to the Lebanon Shopping Center in the Toyota. While in the hardware store, I saw Officer Robbins of the Lebanon Police Dept. removing the remaining number plate from the car. He gave me a summons for misuse of the plates because the plate had tape over the phrase "Live Free or Die."

7. In order to get home, I fashioned a license plate out of cardboard and placed it on the car. Driving through Plainfield, Sullivan County, I was stopped by a State Trooper who told me that I couldn't drive around like that. He told me that my plates had been impounded. He gave me a summons for misuse of plates. He told me he would drop the charge if the Lebanon Police Department would drop their charges.

On January 31, 1975, I was tried and convicted in Lebanon Diatrist [sic] Court for misuse of plates. The judge sentenced me to pay a $50 fine and to serve six months in jail which was suspended. The judge also held that I would have to pay the $25 which had been previously suspended. When I advised the judge that I would not pay the fine as being against my Christian conscience, he said he was committing me to the Grafton County House of Corrections in Woodsville for fifteen days ($5 per day). They took me to jail that day. First they took me to Hanover then to the House of Corrections. Although I asked for food, they said the kitchen was closed. I didn't get anything to eat until the next day. The case in Claremont District Court for driving with cardboard plates is still pending.

8. Since my license plates had been confiscated, I applied to the Department of Motor Vehicles for commercial plates. These do not bear the State motto and seemed a good solution to the problem. That request was denied and I have been issued two new sets of number plates (SR 755 for the Toyota; SF 740 for the Plymouth) each of which bears the inscription, "Live Free or Die."

9. I am a printer by trade. I am presently unempoyed [sic] and must look for work. I am not drawing unemployment compensation. My wife works for Sarah Coventry Jewelry Company. She demonstrates jewelry through a house party plan. This involves calling on peoples' homes. My wife is paid

by commission and this is the only source of income for our family right now. Use of a car is essential to her job.

I have two cars sitting in the yard which I cannot use. The new plates must be affixed to the cars by March 1, 1975 before they can be driven. I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent. My alternatives are to go back to jail or to leave the state.

Dated: February 28, 1975 /s/ George Maynard
George Maynard

(Certificate of Service omitted in printing)

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Filed March 7, 1975

I. INTRODUCTION

1. This is a complaint for declaratory and injunctive relief under 42 U.S.C. 1983. Plaintiffs seek a declaration that RSA 263:1 is unconstitutional on its face and as applied to the plaintiffs insofar as it mandates that non-commercial license plates carry the state motto, "Live Free or Die," as abridging rights guaranteed to them by the First and Fourteenth Amendments. Plaintiffs also seek a declaration that RSA 262:27-C violates the First and Fourteenth Amendments insofar as it makes it a crime to obscure the words "Live Free or Die" on number plates. Plaintiffs seek an injunction against the enforcement, operation and execution of RSA 263:1 and RSA 262:27-C and specifically seek to restrain the defendants from arresting or prosecuting them for covering over these words.

II. JURISDICTION

2. Jurisdiction is vested in the court by 28 U.S.C. Sec. 1343(3).

III.
REQUEST FOR THREE JUDGE COURT

3. Because this suit seeks interlocutory and permanent injunctive relief agaonst [sic] officers of the state in the enforcement and execution of state statutes, plaintiffs request the court to convene a three judge district court pursuant to 28 U.S.C. Sec. 2281.

IV.
PARTIES

4. Plaintiff George Maynard is a citizen of the United States and a resident of Claremont, New Hampshire.

5. Plaintiff Maxine Maynard is a citizen of the United States and a resident of Claremont, New Hampshire.

6. Defendant Neal R. Wooley is Chief of Police of Lebanon, New Hampshire. Acting under color of state law, he has prosecuted plaintiff George Maynard under RSA 262:27-C for taping over the words "Live Free or Die" on his number plates. He has publicly stated that he was instructing his men to arrest Mr. Maynard again if he persists in obscuring those words.

7. Defendant Paul A. Doyon is Director of the New Hampshire State Police. Under RSA 106-B:12, police employees are responsible for patrolling the highways, enforcing the highway traffic laws and regulations and enforcing the motor vehicle laws relative thereto. Plaintiff George Maynard has been arrested by a state trooper for a related offense under RSA 262:27-C.

8. Defendant Frederick Clark, Jr. is Commissioner of the Department of Motor Vehicles and is authorized to issue number plates. RSA 260:9. Under RSA 260:10-a and RSA 260:11-B, the Commissioner is authorized to design and issue special number plates to citizens who want their initials on their plates and to Citizens Band Operators. He has refused to issue the plaintiffs number plates without the state motto embossed on them.

V.
STATEMENT OF FACTS

9. George and Maxine Maynard are residents of Claremont, New Hampshire. They own two automobiles, a Toyota Carolla [sic] and a Plymouth Station Wagon. Both cars are registered with the New Hampshire Department of Motor Vehicles as non-commercial vehicles.

10. RSA 263:1 requires that non-commercial license plates bear the state motto, "Live Free or Die." The plaintiffs have a deeply felt conviction against this sentiment based on religious and political grounds.

11. Beginning in March or April, 1974, the plaintiffs began placing tape over the motto, "Live Free or Die" on their license plates. They did not obscure the numerals on the plates or the words "New Hampshire." In May or June, because neighborhood children kept removing the tape, Mr. Maynard punched out the words "or die" with a nail. He continued to keep the motto taped over, however, and the hole was not visible unless the tape was removed.

12. On November 27, 1974, plaintiff George Maynard was issued a summons by an officer of the Lebanon Police Department for misuse of plates under RSA 262:27-C. The officer confiscated one of the license plates. Plaintiff was tried and convicted of misuse of plates in Lebanon District Court on December 6, 1974. Defendant Neal Wooley, Chief of the Lebanon New Hampshire Police Department, prosecuted him. He was fined $25, which fine was suspended.

13. On December 31, 1974 while in Lebanon, Mr. Maynard saw a police officer removing the remaining plate from his car. He was given a summons charging him with misuse of plates because the words "Live Free or Die" were taped over.

14. Plaintiff fashioned a license plate out of cardboard and affixed it to the car so he could get home. In Plainfield, New Hampshire he was stopped by a state trooper who gave him yet another summons for misuse of plates for failing to display his duly issued number plates.

15. On January 10, 1975, plaintiff drove his Plymouth station wagon to the Lebanon District Court to answer the charge described in paragraph 13. The case was continued until January 31. While he was in the courtroom, an officer of the Lebanon Police Department removed both license plates from the Plymouth and confiscated them.

16. On January 31, 1975, Mr. Maynard was tried and convicted for misuse of plates in Lebanon District Court on the summons described in paragraph 13. He was sentenced to pay a fine and was given a six month suspended sentence. When plaintiff explained to the court that he would not pay the fine as a matter of his Christian conscience, the court sentenced him to serve fifteen days in the Grafton County House of Corrections. Plaintiff has served his sentence and is now free.

V. [sic]
STATEMENT OF CLAIM

17. RSA 263:1, insofar as it requires noncommercial number plates to bear the state motto "Live Free or Die", on its face and as applied to the plaintiffs in this case, abridges the right to be free from a required affirmation or belief under the First and Fourteenth' [sic] Amendments.

18. RSA 263:1, insofar as it requires noncommercial number plates to bear the state motto, as applied to the plaintiffs in this case, abridges the right to free exercise of religion under the First and Fourteenth Amendments.

19. RSA 263:1, insofar as it requires non-commercial plates to bear the state motto, violates the equal protection clause of the fourteenth amendment.

20. Insofar as RSA 262:27-C makes it a crime to cover or obliterate the state motto on non-commercial license plates, it violates the right to symbolic speech under the First and Fourteenth Amendments on its face and as applied.

21. RSA 262:27-C violates the due process clause of the fourteenth amendment insofar as it makes it a crime to cover the state motto on license plates because there is no reasonable relation between a system of motor vehicle registration and a legislative purpose to encourage State pride and individualism.

VI.
REQUEST FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

22. Plaintiff Goerge [sic] Maynard is an unemployed printer. He needs the use of his automobiles to look for employment. He has been arrested twice by the Lebanon Police Department and convicted for misuse of plates because he has covered over the words "Live Free or Die" on his number plates.

23. Each time Mr. Maynard is given a summons, his license plates are confiscated by the police. When he attempted to drive home using a cardboard plate, he was arrested again by a state trooper. His objections to displaying the words "Live Free or Die" on his private property are religiously and politically based. The strength of these convictions is attested to by the fact that he spent fifteen days in jail rather than pay a $75 fine. Unless injunctive relief is granted, Mr. Maynard will continue to be arrested and jailed for defacing his license plates. Defendant Wooley has publicly stated that he was instructing his men to arrest Mr. Maynard again if he persists. His only alternative is to leave the State of New Hampshire.

24. Plaintiffs have taken reasonable non-legal steps to solve the problem. They have applied for commercial plates which do not bear the motto. They have been advised by Defendant Frederick Clark, Jr. that commercial plates would be issued for his station wagon if it was used in a business, but not otherwise, and that in order to get commercial plates for the Toyota he would have to trade it in for a truck. Mr. Maynard has paid his registration fees and has been issued two sets of 1975 license plates, all bearing the legend "Live Free or Die."

25. Mrs. Maynard works for Sarah Coventry Jewelry Company. She demonstrates jewelry through a house party plan. Without the use of a car, she cannot call on peoples' homes.

26. The plaintiffs request the court to issue a preliminary injunction to restrain defendants Wooley and Doyon, their agents and servants from arresting or prosecuting them if they cover over the words "Live Free or Die" on their new number plates. In the alternative, they seek an injunction against these defendants, their agents and servants from confiscating the

plaintiffs' number plates in the event they are issued more summonses for violating RSA 603:1.

27. Plaintiffs also seek permanent injunctive relief against defendant Clark to require him to issue them number plates without the state motto in the event that they succeed on the merits. Plaintiffs further request that the preliminary relief requested in para. 26 be made permanent.

WHEREFORE, petitioners pray,

1. That the court take jurisdiction of this case and request the [sic] the Chief Judge of the Circuit to convene a three judge court;

2. That the three judge court declare RSA 263:1 unconstitutional on its face and as applied to the plaintiffs insofar as it requires all non-commercial plates to bear the words "Live Free or Die" because it violates the First and Fourteenth Amendments to the United States Constitution;

3. That the court hold RSA 262:27-C invalid under the First and Fourteenth Amendments insofar as it makes it a crime to obscure the words "Live Free or Die" on number plates;

4. That the court issue preliminary and permanent injunctive relief restraining defendants Wooley and Doyon from enforcing the provisions of RSA 263:1 by issuing summonses and bringing criminal prosecutions against the plaintiffs under RSA 262:27-C.

5. That the court grant such other relief as it deems meet and just.

Dated: March 7, 1975

/s/ Richard S. Kohn
Richard S. Kohn
Vt.-N.H. Staff Counsel
New Hampshire Civil
Liberties Union, Inc.
3 Pleasant Street
Concord, New Hampshire

/s/ George Maynard
George Maynard

(Jurat and Certificate of Service omitted in printing)

MOTION TO DISMISS

Filed March 7, 1975

NOW COME the Defendants, Paul A. Doyon and Frederick Clark, Jr., individually and in their capacities as officials of the State of New Hampshire, and move the Court by saying:

1. Plaintiffs seek, among other remedies, an injunction restraining the Defendants from enforcing certain New Hampshire statutes, to wit, New Hampshire RSA 263:1 (supp) and RSA 262:27-c (supp) upon the ground that such statutes violate the United States Constitution.

2. Plaintiffs have failed to request the convening a three-judge district court to decide such issues, as required by 28 U.S.C. §2281.

3. Plaintiff George Maynard has been tried and convicted of two violations of these statutes in the courts of New Hampshire where he concededly raised constitutional issues. *Complaint*, para. IV, 11, 14.

WHEREFORE, the Defendants respectfully pray that this Complaint be dismissed

A. For lack of jurisdiction, under Rule 12 (b) (1) of F. R. Civ. P.; and

B. For failure to state a claim upon which relief can be granted, under Rule 12 (b) (6) of F. R. Civ. P.; and

C. On grounds of collateral estoppel. *Bricker* vs. *Crane*, 468 F.2d 1228 (1st Cir. 1972).

Respectfully submitted,

Colonel Paul A. Doyon and
Frederick Clark, Jr.

By /s/ David W. Hess
David W. Hess
Assistant Attorney General

(Certificate of Service omitted in printing)

OBJECTION TO MOTION FOR TEMPORARY RESTRAINING ORDER

Filed March 7, 1975

NOW COME the defendants, FREDERICK CLARKE, JR. and PAUL A. DOYON, individually and in their capacities as officials of the State of New Hampshire, and object to the plaintiffs' Motion for Temporary Restraining Order by saying:

1. Plaintiffs have failed to show that issuance of a temporary restraining order is necessary to prevent irreparable damage during the pendency of this action where the affidavit of GEORGE MAYNARD discloses that the plaintiffs waited 32 days from the date plaintiff GEORGE MAYNARD was tried, convicted and sentenced before filing this action, and where plaintiffs make no allegations that their status will be materially altered or in any way affected if such an order does not issue.

2. Plaintiffs have failed to make any showing of probable ultimate success in this action, and in fact are likely to fail on the merits. *See State vs. Hoskin,* 112 N.H. 332 (1972).

3. Plaintiffs have alleged no urgent circumstances warranting the issuance of a temporary restraining order and have failed to show that they have acted with the requisite speed and prudence to protect their interests.

4. Issuance of a temporary restraining order in this proceeding would adversely affect the public interest in maintaining uniform motor vehicle license plate systems and uniformly enforcing duly enacted penal legislation, and would detract from the legislative determination that display of the State motto promotes the general welfare by encouraging State pride and individualism. *See State vs. Hoskin, supra.*

Dated: Concord, New Hampshire
March 7, 1975

Respectfully submitted,

COL. PAUL A. DOYON, defendant
FREDERICK CLARK, JR., defendant

By: David W. Hess
David W. Hess
Assistant Attorney General

(Certificate of Service omitted in printing)

TEMPORARY RESTRAINING ORDER

Filed March 11, 1975

Both plaintiffs have alleged and testified that they have religious objections to the State motto, "Live Free or Die," being affixed to their privately owned automobiles.

On the basis of the affidavit, the pleadings and the testimony of the plaintiffs, it is clear that they have and will continue to suffer irreparable harm unless a temporary restraining order is issued. The Maynards own two automobiles: a station wagon, which Mr. Maynard uses; and a Toyoto, which Mrs. Maynard uses. The plaintiff George Maynard has spent fifteen days in the Grafton County House of Correction because he refused to pay a fine imposed after his conviction under NH RSA 262:27-C for placing tape over the words "Live Free or Die" on his license plates. Mr. Maynard has been given summonses on two occasions for misuse of plates, and his 1974 license plates were all confiscated by the police. He has been unable, of course, to use his automobile which made it impossible for him to meet his former employer's work schedule and makes it impossible for him now to look for work. Mrs. Maynard was a full-time employee of a jewelry manufacturer and has been unable to sell jewelry from door to door since she lost the use of her car. The evidence shows that they will not drive their cars with the State motto affixed to the number plates. If they operate their cars with the words "Live Free or Die" taped over or obliterated in any way, they will, of course, be subject to further criminal penalties. Mr. Maynard will be restricted in his ability to find work and Mrs. Maynard will continue to be unable to sell jewelry which is part of the needed income for the family.

On the other hand, it does not appear that the state will be irreparably injured by the issuance of a temporary restraining order pending the convening of a Three-Judge Court.

I also rule that there is a probability of success on the merits.

The defendants' motion to dismiss is denied.

WHEREFORE IT IS ORDERED THAT:

During the pendency of this restraining order, the plaintiffs may place tape over the words "Live Free or Die" on their 1975 license plates, but said tape must not in any way interfere with the words "New Hampshire" or the numerals on the plates.

Defendant Wooley as Chief of Police of the Lebanon Police Department, his agents, servants, employees and all others acting in concert with them are enjoined from issuing summonses or initiating prosecutions of the plaintiffs and from removing and impounding the plaintiffs' license plates from their cars during the pendency of this restraining order, or until further order of the court.

Defendant Paul A. Doyon, Director of the New Hampshire State Police, his agents, servants, employees and others acting in concert with them are similarly enjoined from issuing summonses or initiating prosecutions against the plaintiffs and from removing and impounding the plaintiffs' license plates during the pendency of this restraining order, or until further order of the court.

SO ORDERED.

March 11, 1975

/s/ Hugh H. Bownes
Hugh H. Bownes
United States District Judge

STIPULATION OF FACTS
Filed May 1, 1975

NOW COME the parties to the above entitled matter and stipulate as to the following facts:

1. Plaintiffs George and Maxine Maynard are husband and wife, citizens of the United States and residents of Claremont, County of Sullivan and the State of New Hampshire.

2. Defendant Neal R. Wooley is Chief of Police of Lebanon. New Hampshire.

3. Defendant Paul A. Doyon is Director of the New Hampshire State Police.

4. Defendant Frederick Clark, Jr., is Commissioner of the Department of Motor Vehicles, State of New Hampshire.

5. The plaintiffs own two automobiles, a 1971 Toyota and a 1968 Plymouth.

6. Both said automobiles are registered with the New Hampshire Department of Motor Vehicles as non-commercial vehicles.

7. Pursuant to RSA 263:1 (supp), non-commercial license plates bear the state motto, "Live Free or Die."

8. Beginning in March or April, 1974, the plaintiffs began placing non-transparent tape over the said motto on the license plates assigned by the Department of Motor Vehicles, State of New Hampshire, to the said two automobiles. The plaintiffs did not obscure the numerals on the license plates or the words, "New Hampshire." In May or June, 1974, because neighborhood children kept removing the tape, Mr. Maynard cut out of the license plates the words "or Die" and covered the resulting hole, as well as the words "Live Free" with tape.

9. By Lebanon District Court complaint dated November 27, 1974, Mr. Maynard was charged with a violation of RSA 262:27-c. This alleged offense related to the 1971 Toyota automobile. A law enforcement officer seized as evidence one of the license plates from said automobile. On December 6, 1974, Mr. Maynard was found guilty by the Lebanon District Court and was ordered to pay a fine of $25.00 which fine was suspended. A copy of said complaint is attached hereto as Appendix A.

10. By Lebanon District Court complaint dated December 28, 1974, Mr. Maynard was charged with a second violation of RSA 262:27-c. This alleged offense also related to the 1971 Toyota automobile. On January 31, 1975, Mr. Maynard was found guilty and was sentenced to pay a fine of $50.00 and was ordered sentenced to the Grafton County House of Correction for six months, which imprisonment was suspended. A copy of said complaint is attached hereto as Appendix B.

11. Mr. Maynard advised the court that he would refuse to pay the fines, now totalling $75.00, as a matter of conscience and not due to inability to pay. The court then ordered that Mr. Maynard be committed to the House of Correction for fifteen days. Mr. Maynard served his sentence and was released on or about the fifteenth of February, 1975.

12. By complaint dated January 3, 1975, Mr. Maynard was charged with a third violation of RSA 262:27-c. This alleged offense related to the 1968 Plymouth automobile. Mr. Maynard was found guilty on January 31, 1975, and the case was continued for sentence. A copy of this complaint is attached hereto as Appendix C.

13. In his defense of the said complaints, Mr. Maynard argued that his acts with respect to the license plates were the result of his personal religious convictions and, with respect to the fine imposed by the Lebanon District Court on January 31, 1975. refused to pay same as a matter of conscience.

14. The complainant in each of the above three complaints was Neal R. Wooley, Chief of Police of Lebanon, New Hampshire. Each case was prosecuted by Chief Wooley.

George Maynard &
Maxine Maynard

By, s/Richard S. Kohn

Neal R. Wooley, Paul A.
Doyon and
Frederick Clark, Jr.

By, /s/Robert V. Johnson, II
Assistant Attorney General

Neal R. Wooley, Individually

By /s/ R. Peter Decato

Appendix A.

THE STATE OF NEW HAMPSHIRE
GRAFTON, SS

LEBANON DISTRICT COURT
No. 2930

COMPLAINT

TO THE LEBANON DISTRICT COURT
The undersigned complains to said Court that the defendant
(Name) George C. Maynard of
(Address) RFD 2 Thrasher Road, Claremont, N.H. on or about
(Date of Offense) November 27, 74 at approximately (time) 9:05 P m. on/at
(Location) Route 12-A in ~~(Town)~~ City of Lebanon(west)
in said county and state, did commit the offense of
(Offense) Misuse of Plates
contrary to RSA 262:27-c and the laws of New Hampshire, for which the defendant should be held to answer, in that the defendant did knowingly attach to his motor vehicle, to wit a 1971 Toyota, a set of 1974 New Hampshire registration plates number SR-755, said number plates having been assigned by the Director of Motor Vehicles, and the said George C. Maynard to whom the said plates were assigned, did allow the plates to be obscured in that the figures LIVE FREE OR DIE were covered over with a strip of red tape, and the figures OR DIE had been cut away from the plates

against the peace and dignity of the State.
DATE: November 27, 1974

Neal R. Wooley
Complainant

OATH: Subscribed and sworn to by the complainant, before me,

Justice of the Peace

PLEA: Upon arraignment the defendant pleaded as follows:
( ) Guilty (X) Not Guilty ( ) Nolo Contendere ( ) Entered no plea

FINDING: After hearing the court found that the defendant was
(X) Guilty ( ) Not Guilty

SENTENCE: The following sentence (or other order) was imposed:
(X) Fine of $ 25.00 Suspended during good behavior
( ) Commitment to House of Correction at Haverhill at hard labor for period of ____ days ____ months.
( ) Commitment suspended upon payment of $____ fine.
( ) Sentence suspended during good behavior. Order of Commitment may issue upon petition to court.
( ) Case continued for sentence. ( ) Complaint placed on file.
( ) Defendant's license (or right) to operate a motor vehicle revoked for period of____
( ) Recommended suspension of license (or right) to operate motor vehicle for period of ____
( ) Defendant placed on probation for period of ____ months.
( ) Defendant failed to appear. $____ bail forfeited.
( )

1/31/75 - Respondent upon continuity thru duty for cause of... Fine of $25.00 is ordered forward + has paid [illegible]

DATE: 12-6-74

Justice

DOB 3-5-32 LIC. NO. 03 MD0 32051 NH REG. SR-755 NH

AC 010

A True Copy
Attest: Gabriel Gudas, Clerk

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APPENDIX A-1

THE STATE OF NEW HAMPSHIRE
[redacted] GRAFTON, SS.

LEBANON
[redacted] DISTRICT COURT
No. 2730

COMPLAINT

TO THE LEBANON DISTRICT COURT
The undersigned complains to said Court that the defendant
(Name) George E. Maynard of
(Address) R.F.D. #2, Thrasher Road, Claremont, New Hampshire on or about
(Date of Offense) November 27, 1974 at approximately (time) 9:05 P.m., on/at
(Location) Route 12-A in (Town) City of Lebanon (west)
in said county and state, did commit the offense of
(Offense) Misuse of Plates
contrary to RSA 262:27-c and the laws of New Hampshire, for which the defendant should be held to answer, in that the defendant did knowingly attach to his motor vehicle, to wit, a 1971 Toyota, a set of 1974 New Hampshire registration plates number SR-755, said number plates having been assigned by the Director of Motor Vehicles, and the said George C. Maynard to whom the said plates were assigned, did allow the plates to be obscured in that the figures LIVE FREE OR DIE were covered over with a strip of red tape, and the figures OR DIE had been cut away from the plates,

against the peace and dignity of the State.
DATE: November 27, 1974 /s/ Neal R. Wooley
Complainant

OATH: Subscribed and sworn to by the complainant, before me, /s/ Patrick J. Walsh
Justice of the Peace

PLEA: Upon arraignment the defendant pleaded as follows.
( ) Guilty (X) Not Guilty ( ) Nolo Contendere ( ) Entered no plea

FINDING: After hearing the court found that the defendant was
(X) Guilty ( ) Not Guilty

SENTENCE: The following sentence (or other order) was imposed.
(X) Fine of $25.00 suspended during good behavior
( ) Commitment to House of Correction at Boscawen at hard labor for period of days months.
( ) Commitment suspended upon payment of $ fine.
( ) Sentence suspended during good behavior Order of Commitment may issue upon petition to court.
( ) Case continued for sentence. ( ) Complaint placed on file.
( ) Defendant's license (or right) to operate a motor vehicle revoked for period of
( ) Recommended suspension of license (or right) to operate motor vehicle for period of
( ) Defendant placed on probation for period of months.
( ) Defendant failed to appear. $ bail forfeited.
( ) 1/31/75 respondent upon conviction this date for same offense fine of $25.00 is ordered forward to be paid.
/s/ W. E. Lovejoy

DATE: 12-6-74 /s/ William E. Lovejoy
Justice

DOB 3-5-32 UC. NO. 03 MDG 32051 NH REG. SR-755 NH

A True Copy.
Attest: Patrick J. Walsh, Clerk

Appendix B.

THE STATE OF NEW HAMPSHIRE
GRAFTON, SS

LEBANON DISTRICT COURT
No. 157

COMPLAINT

TO THE LEBANON DISTRICT COURT
The undersigned complains to said Court that the defendant
(Name) George C. Maynard
(Address) Thrasher Road, Claremont, New Hampshire of
(Date of Offense) December 28, 1974 on or about at approximately (time) 3:36 P m., on/at
(Location) North Park Street in (Town) City of Lebanon
in said county and state, did commit the offense of
(Offense) Misuse of Plates
contrary to RSA 262:27-c and the laws of New Hampshire, for which the defendant should be held to answer, in that the defendant did knowingly attach to his motor vehicle, to wit a 1971 Toyota, a set of 1974 New Hampshire registration plates number SR 755, said number plates having been assigned by the Director of Motor Vehicles, and the said George C. Maynard to whom the said plates were assigned, did allow the plates to be obscured in that the figures LIVE FREE OR DIE were covered over with a strip of red tape, and the figures OR DIE had been cut away from the plate

1/31/75. Respondent known refused to comply with the order of this Court in the payment of the Total fine of $75.00 and having indicated to the Court that his refusal is willful & contumacious and not to inconvenience or disadvantage Respondent in this respect Committed to the Grafton County House of Correction for thirty days pursuant to RSA 618:9 for 1 days or Stand committed. Paul R. Lindsay

against the peace and dignity of the State.
DATE: December 28, 1974 Justice

OATH: Subscribed and sworn to by the complainant, before me, /s/ Patrick J. Walsh
Justice of the Peace

PLEA: Upon arraignment the defendant pleaded as follows.
( ) Guilty (X) Not Guilty ( ) Nolo Contendere ( ) Entered no plea

FINDING: After hearing the court found that the defendant was
(X) Guilty ( ) Not Guilty

SENTENCE: The following sentence (or other order) was imposed.
(X) Fine of $ 56.00
( ) Commitment to House of Correction at Haverhill at hard labor for period of days months.
( ) Commitment suspended upon payment of $ fine.
( ) Sentence suspended during good behavior. Order of Commitment may issue upon petition to court.
( ) Case continued for sentence. ( ) Complaint placed on file.
( ) Defendant's license (or right) to operate a motor vehicle revoked for period of
( ) Recommended suspension of license (or right) to operate motor vehicle for period of
( ) Defendant placed on probation for period of months.
( ) Defendant failed to appear. $ bail forfeited.
(X) Suspension of bail ordered forthwith upon conviction for time of failure to appear in this Court 12/6/74 is vacated and the respondent is to pay $ 56.00 forthwith

DATE: 1/31/75 refused to pay / Justice
DOB 3-5-32 UC. NO. 03 MDG 32051 REG. SR-755

AC 010

A True Copy.
Attest: Patrick J. Walsh, Clerk

TYPED REPRODUCTION OF ORIGINAL

APPENDIX B-1

THE STATE OF NEW HAMPSHIRE
GRAFTON, SS.

LEBANON DISTRICT COURT
No. 151

COMPLAINT

TO THE CONCORD DISTRICT COURT
The undersigned complains to said Court that the defendant
(Name) George C. Maynard of
(Address) Thrasher Road, Claremont, New Hampshire on or about
(Date of Offense) December 28, 1974 approximately (time) 3:36 p.m., on/at
(Location) North Park Street in City of Lebanon
in said county and state, did commit the offense of
(Offense) Misuse of Plates
contrary to RSA 262:27-c and the laws of New Hampshire, for which the defendant should be held to answer, in that the defendant did knowingly attach to his motor vehicle, to wit, a 1971 Toyota, a set of 1974 New Hampshire registration plates number SR 755, said number plates having been assigned by the Director of Motor Vehicles, and the said George C. Maynard to whom the said plates were assigned, did allow the plates to be obscured in that the figures LIVE FREE OR DIE were covered over with a strip of red tape, and the figures OR DIE had been cut away from the plate,

1/31/75 - Respondent having refused to comply with the order of this court in the payment of a total fine of $75.00 and having advised the court that his refusal is one of conscience and not of inability to pay because of indigency, Respondent is therefore ordered committed to the Grafton County House of correction pursuant to RSA 618:9 for 15 days. Stand committed.

/s/ William E. Lovejoy, Justice

against the peace and dignity of the State.
DATE: December 28, 1974
/s/ Neal R. Wooley
Complainant

OATH: Subscribed and sworn to by the complainant, before me,
/s/ Patrick J. Walsh
Justice of the Peace

PLEA: Upon arraignment the defendant pleaded as follows:
( ) Guilty (X) Not Guilty ( ) Nolo Contendere ( ) Entered no plea

FINDING: After hearing the court found that the defendant was
(X) Guilty ( ) Not Guilty

SENTENCE: The following sentence (or other order) was imposed:
(X) Fine of $. 50.00
( ) Commitment to House of Correction at Boscawen at hard labor for period of ..... days months.
( ) Commitment suspended upon payment of $. ..... fine.
( ) Sentence suspended during good behavior. Order of Commitment may issue upon petition to court.
( ) Case continued for sentence. ( ) Complaint placed on file.
( ) Defendant's license (or right) to operate a motor vehicle revoked for period of .....
( ) Recommended suspension of license (or right) to operate motor vehicle for period of .....
( ) Defendant placed on probation for period of ..... months.
( ) Defendant failed to appear. $..... bail forfeited.
(X) Suspension of fine ordered on conviction for same offense in this court 12/6/74 is vacated and the respondent is ordered to pay the same.

/s/ William E. Lovejoy

DATE: 1/31/75
/s/ William E. Lovejoy
Justice

DOB 3-5-32 LIC. NO. 03 MDG 32051 REG. SR 755

A True Copy.
Attest: Patrick J. Walsh, Clerk

Appendix C.

THE STATE OF NEW HAMPSHIRE
GRAFTON, SS

LEBANON DISTRICT COURT
No. 152

COMPLAINT

TO THE LEBANON DISTRICT COURT
The undersigned complains to said Court that the defendant
(Name) George C. Maynard of
(Address) Thrasher Road, Claremont, New Hampshire on or about
(Date of Offense) January 3, 1975 at approximately (time) 4:20 P.m., on/at
(Location) East Park Street in City of Lebanon
in said county and state, did commit the offense of
(Offense) Misuse of Plates
contrary to RSA 262:27-c and the laws of New Hampshire, for which the defendant should be held to answer, in that the defendant did knowingly attach to his motor vehicle, to wit a 1968 Plymouth station wagon, a set of 1974 New Hampshire registration plates number SP 740, said number plates having been assigned by the Director of Motor Vehicles, and the said George C. Maynard to whom the said plates were assigned, did allow the plates to be obscured in that the figures OR DIE in the State Motto had been cut away and the hole covered with white tape

against the peace and dignity of the State.
DATE: January 3, 1975
/s/ Neal R. Wooley
Complainant

OATH: Subscribed and sworn to by the complainant, before me,
/s/ Patrick J. Walsh
Justice of the Peace

PLEA: Upon arraignment the defendant pleaded as follows:
( ) Guilty (X) Not Guilty ( ) Nolo Contendere ( ) Entered no plea

FINDING: After hearing the court found that the defendant was
(X) Guilty ( ) Not Guilty

SENTENCE: The following sentence (or other order) was imposed:
( ) Fine of $.....
( ) Commitment to House of Correction at Haverhill at hard labor for period of ..... days months.
( ) Commitment suspended upon payment of $..... fine.
( ) Sentence suspended during good behavior. Order of Commitment may issue upon petition to court.
(X) Case continued for sentence. ( ) Complaint placed on file.
( ) Defendant's license (or right) to operate a motor vehicle revoked for period of .....
( ) Recommended suspension of license (or right) to operate motor vehicle for period of .....
( ) Defendant placed on probation for period of ..... months.
( ) Defendant failed to appear. $..... bail forfeited.
( ) .....

DATE: 1/31/75
/s/ William E. Lovejoy
Justice

DOB 3-5-32 LIC. NO. 03 MDG 32051 REG. SP 740

AC 010

A True Copy.
Attest: Patrick J. Walsh, Clerk

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APPENDIX C-1

LEBANON DISTRICT COURT
No. 152

THE STATE OF NEW HAMPSHIRE
GRAFTON, SS.

LEBANON DISTRICT COURT

COMPLAINT

TO THE DISTRICT COURT
The undersigned complains to said Court that the defendant
(Name) George C. Maynard of
(Address) Thrasher Road, Claremont, New Hampshire on or about
(Date of Offense) January 3, 1975 at approximately (time) 4:20 p. m., on/at
(Location) East Park Street in City of Lebanon
in said county and state, did commit the offense of
(Offense) Misuse of Plates
contrary to RSA 262:27-c and the laws of New Hampshire, for which the defendant should be held to answer, in that the defendant did knowingly attach to his motor vehicle, to wit, a 1968 Plymouth station wagon, a set of 1974 New Hampshire registration plates number SF 740, said number plates having been assigned by the Director of Motor Vehicles, and the said George C. Maynard to whom the said plates were assigned, did allow the plates to be obscured in that the figures OR DIE in the State Motto had been cut away and the hole covered with white tape,

against the peace and dignity of the State.
DATE: January 3, 1975 /s/ Neal R. Wooley
Complainant

OATH: Subscribed and sworn to by the complainant, before me. /s/ Patrick J. Walsh
Justice of the Peace

PLEA: Upon arraignment the defendant pleaded as follows:
( ) Guilty (X) Not Guilty ( ) Nolo Contendere ( ) Entered no plea

FINDING: After hearing the court found that the defendant was
(X) Guilty ( ) Not Guilty

SENTENCE: The following sentence (or other order) was imposed.
( ) Fine of $.
( ) Commitment to House of Correction at Boscawen at hard labor for period of days months.
( ) Commitment suspended upon payment of $ fine.
( ) Sentence suspended during good behavior. Order of Commitment may issue upon petition to court.
(X) Case continued for sentence. ( ) Complaint placed on file.
( ) Defendant's license (or right) to operate a motor vehicle revoked for period of
( ) Recommended suspension of license (or right) to operate motor vehicle for period of
( ) Defendant placed on probation for period of months.
( ) Defendant failed to appear. $ bail forfeited.
( )

DATE: 1/31/75 /s/ William E. Lovejoy
Justice

DOB 3-5-32 LIC. NO. 03 MDG 32051 REG. SF 740

A True Copy.
Attest: Patrick J. Walsh, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

EXCERPTS FROM TRANSCRIPT OF HEARING ON SEPTEMBER 22, 1975

[6] MR. JOHNSON: Your Honor, if, in fact, the present state of the affairs of this case is that the petitioners own one vehicle, that that is not a station wagon, then the State is in a position to stipulate that if that vehicle is not used for commercial purposes, then the only plate available to the petitioners is a plate bearing the State Motto "Live Free or Die."

JUDGE BOWNES: Doesn't that take care of it, Mr. DePuy?

MR. DE PUY: I think it does, except as to our denial of the equal protection argument as to the fact other plates are issued by the State for dealer plates and farm plates, agricultural plate.

JUDGE BOWNES: That is a fact. We can't do anything about that. That is a fact, isn't it?

MR. DE PUY: Yes, Your Honor.

JUDGE BOWNES: Mr. Johnson, can it almost be stipulated that, except for the regular, what shall I call it, residential plates, no other plates in the state that are issued, commercial plates of any kind and initial plates, and whatever else there are, bear the motto, isn't that true?

MR. JOHNSON: Your Honor, I would not only go so far as to so stipulate, but we have here this morning a sample plate of
[7] each type made available in the State of New Hampshire. And, if counsel for the practitioners would agree, we would offer those into evidence and so stipulate.

JUDGE BOWNES: All right.

MR. DE PUY: No objection. We agree, Your Honor.

JUDGE COFFIN: Gentlemen, we don't really need these physical plates themselves. We understand it's been stipulated that the non-commercial plate is the only one carrying the motto. And whatever all the others carry, do we need to know that?

MR. JOHNSON: Your Honor, the State's position would be that I think that it would be of value to the Court, because I believe there will be testimony that if the motto is taped over on a non-commercial plate, it does raise problems with regard to the identification of motor vehicles by law enforcement personnel.

JUDGE COFFIN: Will there be testimony on this issue?
MR. JOHNSON: There will, Your Honor.
JUDGE COFFIN: But I thought we had taken care of everything except the sincerity issue in terms of this stipulation that you gentlemen just arrived at.
MR. JOHNSON: I believe there also may be an issue, Your Honor, with regard to whether or not the prosecution of the petitioners herein has been undertaken in bad faith or harrassment.
MR. DE PUY: Your Honor, I think the statutes provide for the issuance of these plates, and I suppose there is no necessity
[8] to have the actual plates marked in evidence.
JUDGE BOWNES: Well, if there is a question as to whether or not taping over the normal plate is going to interfere with the identification, we could accept that normal plate in evidence, and you can perform whatever—you can explain that.
JUDGE COFFIN: At the time that takes place, you can demonstrate or do whatever else you want to do.
We then will proceed to hear your witnesses.
As you gentlemen know, we have other cases on today, and we would very much like to complete this case this morning. Is this feasible?
MR. DE PUY: I think it is, Your Honor.
MR. JOHNSON: It is, Your Honor.
MR. DE PUY: We have one other witness, and perhaps we can eliminate him by stipulation with counsel for the State, and that is Chief Wooley, the Lebanon Police Chief. And the testimony we seek to elicit there is that both the Maynards are under a threat of prosecution for violation of misuse of plates by taping over the motto. And if the State will stipulate to that fact, I think we can eliminate Chief Wooley as a witness.
MR. JOHNSON: The State will not stipulate there is any threat of prosecution to Mrs. Maynard, nor to Mr. Maynard, so long as he complies with the laws of this State.
JUDGE GIGNOUX: Will the State stipulate if they do not comply with the State there is a threat of prosecution?
[9] MR. JOHNSON: Yes, Your Honor.
JUDGE GIGNOUX: And, specifically, they do not comply with the statute here in question, which makes it unlawful, as I understand it, to obliterate "Live Free or Die" on those plates.
MR. JOHNSON: Yes, Your Honor.
JUDGE GIGNOUX: There is a threat of prosecution of both.

MR. JOHNSON: Yes, Your Honor.
JUDGE COFFIN: All right, you may proceed.
MR. DE PUY: One further point we would like to bring to the Court's attention, that under New Hampshire law, RSA 260:10-a, a person can get so-called initial license plates or vanity plates designed by the Director to the person's taste or request.
JUDGE BOWNES: Upon the payment of a fee of $5.00.
MR. DE PUY: That's right, Your Honor.
Mr. Maynard, will you take the stand.

GEORGE C. MAYNARD

called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

(Questions by Mr. DePuy)

Q. Please state your name and address for the Court, Mr. Maynard.
A. George C. Maynard; residence, Claremont, New
[10] Hampshire, Thrasher Road.
Q. What is your occupation?
A. Printer.
Q. Mr. Maynard, will you explain to the Court your objection to the State Motto "Live Free Or Die" that appears on your license plate?
A. Yes, sir, I'll be glad to. The State Motto "Live Free Or Die" is against my Christian conscience and Christian belief. According to the Bible, the understanding that I have, the Bible, in John, 17:3, which mentions here that this means — this is quoted from John, 17:3, this means everlasting life. They are taking the knowledge of you, the only true God and the one whom you sent forth, Jesus Christ.
Here the Bible speaks to me of promise of everlasting life if I have knowledge of God's purpose, and this knowledge is contained in the Bible, which, in John 3:16, which corresponds with this, which states, "For God loved the world so much that he gave his only-begotten Son in order that everyone who exercises faith in Him may not perish, but may have everlasting life."
And so I have been purchased by a ransomer, Jesus Christ, by giving up his life, and I accept this, and I have a hope of gaining everlasting life under God's rule.
So, therefore, the "Live Free Or Die" Motto, it is in conflict with this teaching or this belief that I have in the Bible, and I

[11] teach and live by this, that I would give my life to God. I am not really giving it up if he gives it back to me in resurrection or never have a hope of never tasting that. God's government, I hope and pledge my allegiance to, will manifest itself in the near future.

Q. And it is because of this religious belief you owe that you cannot go along with having this motto on your license plate?

A. Yes, sir. The reason I taped it over, it helped me to live up to my dedication. I am a baptized Witness of Jehovah.

In Romans 10, it says "For with the heart, one exercises faith for righteousness; but, with the mouth, makes public declaration for salvation."

By taping it over, I have made a public declaration of my faith for my salvation.

Q. You also object to this motto on political grounds?

A. Yes, I do.

Q. What are those grounds?

A. Well, ironically, just recently, the Legislators of the State of New Hampshire encourage people to pray in public schools, the Lord's Prayer, the Our Father, and that is recorded in the 6th Chapter of Matthew, and in the 9th and 10th verse. He says "Our Father in heaven, let your name be sanctified. Let your kingdom come. Let your will take place on the earth as it is in heaven."

[12] So here the Lord's Prayer teaches us, all mankind, to pray for God's government to come on earth. And people may ask the question, if God's government is going to come on the earth and rule, what is going to happen to the present government that we have now? Well, here again, we have to turn to God's word, the Bible, which is the Book of Truth, and it is undisputable, it is a written guarantee that what he says is true. As a matter of fact, maybe the Courts use the Bible to take an oath.

And so Daniel brings this point, what is going to happen to the present government? And that is in Daniel, 244, Chapter 2, Verse 44, and I quote:

" And in the days of those kings, the God of heaven will set up a kingdom that will never be brought to ruin, and the kingdom itself will not be passed on to any other people. It will crush and put an end to all these kingdoms, and it itself will stand to time indefinite."

So God promised us of a better government and of a better choice. And this is one of the reasons why I dedicated my life to

God as a Jehovah's Witness is because he promised of a better choice of a government. And so, being an American citizen, I have a free conscience that I enjoy of being able to make a choice and to express this publicly to let people know of my faith.

But, here again, this government promises us life. Here [13] again, in Revelation, 21st Chapter, and the 3rd verse, or 4th verse, Revelation 21:

"And under God's government he promises this: He will wipe out every tear from their eyes, and death will be no more. Neither will be mourning nor outcry, nor pain be any more, for the former things have passed away."

So God promised us in the Bible that he is going to do away with that. And so, therefore, if I would give up my life for a political system or other, then I would be giving up the hope of everlasting life.

JUDGE COFFIN: So far, all that you have said in my mind falls within your first reason, which is a religious reason. Your counsel was asking, if I understood you, whether you had, in addition to the religious reason, any political grounds?

THE WITNESS: Well, a kingdom has subjects, which is a rule. And the prayer that I quoted from, the scriptures say that we pray for God's government, a kingdom, and this kingdom in Daniel 244 says the kingdom will do away with the present system, present governments of the world today. Revelations: Under this kingdom, there will be everlasting life, no death or sickness, no police government. As a matter of fact, Paul, 37:10, look for a bad verse and you won't be able to find one. These are my beliefs and my convictions.

JUDGE GIGNOUX: These are religious convictions?

THE WITNESS: Yes, sir. But they are political, also, be- [14] cause a government, a kingdom is a government, and the Bible speaks of God's government and God's rule.

JUDGE BOWNES: Can we agree they are not political in the conventional sense?

THE WITNESS: I don't understand in the conventional sense. In the system we are living under the rule that we are now—

JUDGE BOWNES: Political to us means a system relative to the government that we have today on a day to day basis rather than looking to the future.

THE WITNESS: Well, the government that I support, you see, the government that I support is God's government, God's

kingdom. That is my choice. So, therefore, I never voted in my life under this political system. I never cast a vote, because my choice is a theocratic government, God's rule, not man's rule. The political system we have today is man's rule. And so my choice is God's rule.

JUDGE BOWNES: All right.

(Questions by Mr. DePuy)

Q. Mr. Maynard, why did you place tape over the motto on your license plates?

A. As I mentioned before, in Romans 10:10, it helped me make a public declaration of my faith that I do not live by the words "Live Free Or Die," that I don't subscribe to this. I will not give my life up for freedom. I would rather live under
[15] bondage and still be alive to be able to enjoy my conscience and enjoy life that has everything to offer. If I give up my life, would the State give it back to me? The banks don't give out money unless they know they have return. And so, therefore, it would be bad business. They will give out something that, you know, they are not going to get back. If I give my life to the State or encourage other people to do it, would the State give it back to me? No. But God will. So, therefore, I will not support that slogan.

Q. At this time, you only have your one car, the Toyota?

A. Yes, sir.

Q. I would like to show you this license plate. Would you identify it for the Court?

A. Yes, sir. This is my license plate.

Q. And from what car was that taken?

A. This is taken from the Plymouth, which we sold. Now, if we are financially in a position, we might buy another car.

Q. And this plate has a piece of fluorescent red or orange tape across the letters "Live Free Or Die" at the top?

A. Yes, sir.

Q. None of the other markings are covered?

A. No, sir, none, the identifciation [sic] of the vehicle has no interference from identifying the car being properly registered.

Q. Is this license plate taped over in the same manner as the
[16] license plates which now appear on your Toyota?

A. Yes, sir.

MR. DE PUY: Because Mr. Maynard would like to keep his plates on his car, I would like to introduce this as an exhibit, Your Honors.

MR. JOHNSON: The State has no objection to this being introduced as an exhibit. The State has objection to the witness putting his license plates back on the car.

JUDGE COFFIN: He objects to the witness placing the tape—

JUDGE BOWNES: What is that, Exhibit No. 1?

THE CLERK: Yes.

JUDGE COFFIN: It may be admitted without objection.

THE WITNESS: I would like to also mention the fact—

JUDGE BOWNES: No, don't mention anything unless a question is asked of you, Mr. Maynard.

THE WITNESS: All right, Your Honor.

(Questions by Mr. DePuy)

Q. On the license plates that appear on your car now, is there any part of the plate that has been cut out?

A. No, sir.

Q. Just taped over?

A. Yes, sir.

Q. Can you tell the Court why you used this bright orange or red fluorescent type tape or reflective tape?

[17] A. The reason for it is that people will recognize what I am doing, which is very effective. A lot of people stop me. And one person says "You can't do that. That's against the law."

I says "Fortunately, I was given permission by the Federal Court in a temporary injunction against the State." And here I was able to converse with him and express my beliefs and my reason for doing so. And so, therefore, I was able to bear witness to the truth of God's kingdom.

Q. Has this taping caused any outbursts or brawls or anything of that nature?

A. No, they haven't. I can see in my rear-view mirror, people stop at a stop sign and are pointing at it and bringing everybody else's attention to it, and that tells you that people are taking notice of the tape. One person even shook my hand and—

Q. Do you drive your car now with that motto on your license plate not taped over?

A. No, sir.

* * *

[20] Q. Did you appear in court in Claremont on January 17th?

A. Yes, sir, I did.

Q. And can you tell us what transpired then and afterwards with regard to that summons?

A. The Judge, I believe, was—I can't remember his name. But, anyway, he asked me if I was guilty, and I pleaded inno-
[21] cent, so he told me the charges were misuse of plates. And I told him—so the case was continued for another date. I can't remember offhand which date that was. I think the Judge's name was Denault, something like that.

Q. And what happened after that?

A. Well, after that, I had to appear in court in Lebanon for that summons on December, was it 3d?

Q. Maybe I can help you. Was this case subsequently ever scheduled for trial again?

A. No, sir.

Q. It's been continued?

A. It's been continued, and I haven't heard anything from the Courts ever since.

Q. Your first conviction in the Lebanon District Court was December 6, 1974. At that time, were you represented by counsel?

A. No, sir, I represented myself.

JUDGE BOWNES: Can't you agree on the status of the District Court proceedings? What do you say it is, Mr. DePuy?

MR. DE PUY: Your Honor, we have a tape recording of the Court proceedings at that time in which Judge Lovejoy advised Mr. Maynard as to the status of the law with regard to misuse of plates, and we would like to introduce that tape recording in evidence, and, with the permission of the Court, play it for the Court at this time.

JUDGE BOWNES: Well, what happened?

[22] MR. DE PUY: What happened was Mr. Maynard gave testimony similar to the testimony he has given to the Court today with regard to the basis of his objection to the motto, and Judge Lovejoy then explained to Mr. Maynard that he had had a similar case in the Lebanon District Court that had been appealed to the Supreme Court, and the Supreme Court had ruled and the law was that, under 282:27-c, you could not tape over the State Motto on your license plate. And we would seek to introduce that evidence to show that Mr. Maynard, not being represented by counsel at the time, had no thought in his mind of appealing that conviction or any subsequent conviction in light of what he thought was good advice from Judge Lovejoy, what he thought was advice of a reliable nature.

JUDGE BOWNES: Did he plead guilty?

MR. DE PUY: No, Your Honor. I will have to let the witness speak for himself as to that. I understand he pleaded innocent.

JUDGE BOWNES: Don't you have a record of that, too? Don't you know what happened?

MR. DE PUY: Yes, Your Honor. He admits to the taping, and he admits to the violation of the statute, but his plea was innocent in that he had a religious and political reason for taking the actions that he did.

JUDGE BOWNES: Well, I thought that you and Mr. Johnson had agreed as to what the status was of the District Court records.

[23] Now, I would like to know, because we went into this at the hearing on the preliminary injunction, and I was either misinformed or misunderstood, but, at that time, there was a mistake. Can you or Mr. Johnson tell us now what the status is of the situation in regard to the District Court?

MR. DE PUY: I think there is no disagreement as to what transpired at the District Court level. The reason we seek to introduce this evidence is with regard to the problem presented with the Younger abstention problem.

JUDGE BOWNES: Well, that's what I am trying to get on. What can you agree on as to what happened in the District Court? How many appearances were there? How many times was he in the District Court?

MR. DE PUY: There were two appearances in the Lebanon District Court.

JUDGE BOWNES: And what happened as to each of them? What is the official decision on each of them?

MR. DE PUY: At the first appearance on December 6, 1974, Mr. Maynard was given a suspended sentence, $25.00 fine, sentence suspended.

JUDGE BOWNES: Now, do you agree to that, Mr. Johnson?

MR. JOHNSON: With the addition that the defendant pled not guilty and was found guilty.

JUDGE BOWNES: Is that correct, Mr. DePuy?

MR. DE PUY: That's correct.

[24] JUDGE BOWNES: That's the first one. What happened the second time?

MR. DE PUY: Subsequently, Mr. Maynard received a summons on December 8, 1974, and January 3, 1975. With

regard to those two summonses, he appeared in Lebanon District Court on January 31, 1975. As to the first summons, he pleaded innocent, he was found guilty, and given a $50.00 fine and a six-month suspended sentence.

JUDGE BOWNES: Mr. Johnson, do you agree as to that?

MR. JOHNSON: Yes, Your Honor.

JUDGE BOWNES: All right, what happened next?

MR. DE PUY: Mr. Maynard then informed the Court that, as a matter of Christian conscience, he could not pay either the prior fine of $25.00 or the subsequent fine of $50.00, whereupon the Court sentenced him to serve fifteen days in the Grafton County House of Correction. As to the remaining charge pending, the Court continued the case for sentencing. To that remaining charge, Mr. Maynard pled innocent and was found guilty.

JUDGE BOWNES: Do you agree to that, Mr. Johnson?

MR. JOHNSON: Yes, Your Honor.

JUDGE BOWNES: Well, now, in one—well, it is stated that, I think in the briefs, if not in the stipulation of fact, that there is a pending sentence. What is the situation in regard to that? Is there a sentence pending?

MR. DE PUY: That last case was marked continued for
[25] sentence, but there's been no sentence since that time.

JUDGE GIGNOUX: Did that come off the hearing at the same time as the second charge?

MR. DE PUY: Yes, it did.

JUDGE GIGNOUX: This is January 31st?

MR. DE PUY: Yes, it did, Your Honor.

JUDGE GIGNOUX: He was convicted of that charge, but it was continued for sentence, is that it?

MR. DE PUY: That's correct, Your Honor.

JUDGE BOWNES: Is that right, Mr. Johnson?

MR. JOHNSON: That's correct, Your Honor.

The State disputes, and will so argue in oral argument, that the sentence was continued means that the case is pending. But it is a correct statement of the facts.

JUDGE BOWNES: All right. And the case in Claremont has just been continued, not continued for sentence, but continued, is that correct?

MR. DE PUY: The case in Claremont, that's correct, Your Honor. But that is a separate case. Now that deals with the problem he had with these cardboard plates, and I don't

think it is relevant to the matter now at hand. But we wanted to bring that situation to the Court's attention.

JUDGE BOWNES: All right.

MR. DE PUY: At this time, I would—

JUDGE GIGNOUX: At any point in any of these State
[26] District Court proceedings, was there any discussion of his right to counsel? You have a record, I understand.

MR. DE PUY: We have a tape recording of the December 6th, the first one.

As to the second one, Mr. Maynard has been prepared to give testimony as to what advice he received at that second one.

JUDGE GIGNOUX: At the December 6th hearing, did the Judge advise him he had a right to counsel?

MR. DE PUY: The Judge advised him there was no need to appeal.

JUDGE GIGNOUX: Not to appeal, I said counsel.

MR. DE PUY: Counsel. No, I don't believe there was, but I would defer to Mr. Maynard on that point.

THE WITNESS: The Judge mentioned or asked me if I wanted a lawyer, and to that I said "No, sir, I would like to make my own defense." But, after the conviction, I asked him "Should I make an appeal?"

MR. JOHNSON: Your Honor, I am going to object. This is not responsive. And, in addition to right of counsel, I appreciate Judge Gignoux's inquiry, but the petitioners know whether the alleged petitioner was denied right to counsel. And I think it is assumed, or has been, it all points to he has been advised of his rights at the District Court.

JUDGE BOWNES: That wasn't assumed at the preliminary hearing. One of the things that impressed me at the pre-
[27] liminary hearing, and Mr. Kohn bore down on, was he never was represented by counsel at any time.

MR. JOHNSON: I think that there is a distinction, Your Honor, between being represented by counsel and being advised of the right to be represented by counsel. And nowhere in the petitioner's briefs has it been argued that this petitioner was not advised of his rights to counsel and did not meaningfully waive those rights.

JUDGE GIGNOUX: Mr. Johnson, my question is directed to the argument in the plaintiffs' brief that extraordinary circumstances present here justify an exception to the rule.

And one of these extraordinary circumstnaces [sic] I understood plaintiffs are emphasizing was that Mr. Maynard was not represented by a lawyer in the District Court proceedings. If I understood his testimony just now, the Judge asked him if he wanted a lawyer, and he said he did not want a lawyer. I suggest it is at least a fact to consider.

MR. JOHNSON: Thank you.

JUDGE BOWNES: There is another question pending.

(Questions by Mr. DePuy)

Q. There was a question as to whether the Judge had advised Mr. Maynard at the first hearing of his right to appeal.

A. I asked the Judge after the sentence if I should make an appeal, and he said it wasn't necessary, because there was nothing to appeal.

[28] MR. JOHNSON: Your Honor, the State objects unless there is an offer of proof. It is hearsay evidence.

THE WITNESS: No, sir, I have witnesses.

JUDGE COFFIN: At the moment, it would seem to me that is—

MR. DE PUY: Your Honor, I think the witness can testify as to his understanding of his right of appeal at that time.

JUDGE COFFIN: I didn't hear you.

MR. DE PUY: I believe the witness can testify as to his understanding of his right to appeal at the time.

JUDGE COFFIN: Yes. You think the fact that such a statement was made can be testified to?

MR. DE PUY: Yes, I do, Your Honor.

JUDGE BOWNES: Well, we do, too.

MR. DE PUY: At this time, we would like to introduce the tape of the first hearing, and, with the Court's permission, play it for the Court.

Now, the first part of the tape is a recitation of Mr. Maynard's testimony given at the trial. The tape runs approximately seven or eight minutes in total.

The second part of the tape is the Judge's explanation of the law.

JUDGE COFFIN: Why do we have to hear the first part of the tape?

[29] MR. DE PUY: It's easier to perhaps hear the whole thing.

THE CLERK: Exhibit No. 3.

(A tape recording was played for the Court.)

(Questions by Mr. DePuy)

Q. Can you tell us what happened?

A. Yes. During the conversation, the tape ran out.

JUDGE COFFIN: Is that all?

JUDGE BOWNES: Is that all for that tape?

MR. DE PUY: That's all for that tape, yes, Your Honor.

JUDGE GIGNOUX: Just so the record is clear, do we understand correctly that the discussion concerning counsel occurred prior to what we heard on the tape?

MR. DE PUY: Yes, I believe that is the case, Your Honor.

JUDGE BOWNES: And, evidently, his discussion with the Judge about an appeal must have occurred after the tape ran out.

MR. DE PUY: I think that is the case, yes, Your Honor.

(Questions by Mr. DePuy)

Q. Mr. Maynard, at the hearing on January 31, 1975, after your initial sentence of the $50.00 fine and six months' suspended sentence, did the Court advise you of your right to appeal at that time?

A. Yes. They told me if I disagreed with the Court's finding, I could make an appeal.

[30] JUDGE BOWNES: When was this?

THE WITNESS: After he sentenced me. No, he fined me. He says $75.00 fine.

JUDGE BOWNES: What date was this, Mr. DePuy?

MR. DE PUY: January 31, 1975.

(Questions by Mr. DePuy)

Q. And what exactly did he say?

A. Well, he says, he explained to me that I find you guilty, and that he told me he is asking $25,00[sic] that he suspended last time, and $50.00 fine. And then he says "The other offense is continued for sentence."

And then he says "Court adjourned." And he walked out. I went to the Clerk, and I told him—

Q. I mean, as to appeal, what do you recall his exact words as to appeal?

A. After he found me guilty, and he gave me the sentence, he says "If you don't agree with the Court's finding, you can make an appeal."

Q. Did he mention getting a lawyer to you?

A. I don't remember. He might have said that, yes.

Q. Were you represented by counsel at that time?

A. No, sir.

Q. Were you personally familiar with the rights of appeal in New Hampshire in the manner in which appeals are taken?

A. No, sir, I'm not too familiar with it.

[31] JUDGE GIGNOUX: On that January 31st appearance, this is the second time you appeared, was there any discussion between you and the Judge at the start of the hearing as to whether you wished a lawyer or not?

THE WITNESS: Yes, sir. He asked me if I wanted to be represented by counsel, and I said no, sir, that I would represent myself.

(Questions by Mr. DePuy)

Q. Other than taping over the plate, have you sought other solutions to your problems and your objection to the motto on the plate?

A. Yes, sir. I went to the Motor Vehicle Department, and there I was under the impression that my wife made application for commercial plates, and it was understood that we would be able to get it. And so, when we received our plates, it was the same old plates, the county plates, "Live Free Or Die" motto. We were very disappointed. We went to the automobile department and asked to see Ann Waters, I believe, and she wasn't available, but the clerk told me that she was in conference. When she came back, Miss Waters advised the clerk we should go see the Commissioner upstairs. So I went to see the Commissioner, and I told him about the problem, and I brought a tape recorder with me to record the conversation. And then he advised me to put the plates on the car and that if I wanted commercial plates, I would have to get a truck.

[32] Q. But you were willing to obtain commercial plates?

A. Yes, sir.

Q. I would like to briefly discuss other activities of a symbolic nature with you, Mr. Maynard. And, specifically, your children are in school. Do they pledge allegiance to the flag?

A. No, sir. The Constitution of the United States gives us that right to abstain pledging allegiance to the flag, because it is an act of worship, so it would be a conflict to our worship and teaching. One method we use pledging to the flag is my children remain seated. We feel, by them being seated, it would be a visual manifestation of their belief, because we know, by standing up, it doesn't show anyone or doesn't bear witness to the fact that they are not taking part in the pledging of allegiance to the flag. And my wife and I do the same thing. We attend school

meetings, and they open up their meeting by a pledge of allegiance. We sit down.

Q. Are you fluent in other forms of communication besides oral communication, sign language?

A. Yes. I have helped three different people through the sign language by speaking without verbal conversation, with the sign. I have helped three people become Jehovah's Witnesses.

Q. How would you describe your ability to write?

A. Well, I have a handicap as far as writing, because I never finished school. I went as far as the ninth grade. And all my writing is very—it is embarrassing at times, but I have to

[33] look up almost every other word in the dictionary in order to make an accurate expression of writing letters. My wife gives me a big help. She writes all the bills and checks. She does all the writing, because I have a handicap.

Q. Is it common to you to communicate by a tape recording?

A. I do this quite frequently if I want to make a record as to what is being said.

Q. Besides the tape over the motto on your license plate, is there any other stickers or things of that nature on your car?

A. Yes. Being a printer, I designed and made up a bumper sticker with a slogan, "Support a Parental Government," which is directed to God's kingdom.

JUDGE BOWNES: A parental—

THE WITNESS: Yes, a parental.

(Questions by Mr. DePuy)

Q. Is this an example of that bumper sticker?

A. Yes, it is. As a matter of fact, it gives you the illustration of the Bible. It gives you the scriptural Lord's Prayer, which is recorded in Matthew 6, Chapter 9 to 10 verse, and Daniel's 2:44, God consuming things. The reason I call it parental government is the father is life-given, Jehovah, God, being life-given. This is the title he has in our father. And Jesus illustrated this in his prayer, Our Father in Heaven. Father is not a name, but it is a title. And God is not a name but a title, also. But the

[34] Bible says that God's name is Jehovah, which is recorded in Isaias or Psalms 83:18, but this is a parental government. And it says here, if you support this, you enjoy peace forever. And this illustration here of the mother hen, Jesus used this in the Bible: how often did I want to gather you people like a mother

hen with a chick, put you under my wings and protect you and have a parental protection. This is to illustrate.

And I also darkened one of the little chicks to show you I am not prejudiced on desegregation.

MR. DE PUY: Thank you.

I would like to have this introduced as Plaintiffs' Exhibit No. 4.

THE CLERK: Plaintiffs' Exhibit No. 4.

JUDGE BOWNES: Bumper sticker.

JUDGE COFFIN: No. 4 has been admitted. No. 3 is for identification.

(Questions by Mr. DePuy)

Q. Is there any other sticker on your car besides that?

A. Yes. I have a decal which has a circle and a square, and this—it doesn't say anything, just a circle and a square. And everyone who recognizes this circle and square would know that it identifies us as square dancers. So my wife and I, for our entertainment,we belong to a club that is Circle 8 in Claremont, New Hampshire, and we enjoy Saturday evening square dances at different clubs in the State, and so forth.

[35] Q. You stated that you would not drive your car with this slogan on your license plate. If you couldn't drive your car, what would happen to your employment?

JUDGE COFFIN: Now, again, didn't we go into this at the preliminary hearing in detail? That was the big issue, or one of the issues, irreparable harm.

MR. DE PUY: Yes, Your Honor. If the State will admit—

JUDGE COFFIN: They have already agreed that the transcript is part of the proceedings in this case.

MR. DE PUY: I have no further questions, Your Honor.

CROSS EXAMINATION

(Questions by Mr. Johnson)

XQ. Mr. Maynard, I believe you testified under direct examination that your taping of the motto on the State license plate was "a public declaration of my faith," is that correct?

A. Yes, sir.

XQ. And you just testified as to other means of communication that you have available to you, such as speeches, printing of slogans, even sign language. You would concur with me that there are other means for you to state your disagreement with the slogan other than your taping the slogan over on your license plate?

A. You are asking that there are other means, but not my preference.

XQ. All right. But there are other means?

[36] A. Yes.

XQ. There is nothing to prohibit you from giving a speech relative to your disagreement with the slogan?

A. I object to that for the reason it is a negative way of expressing. I would rather be positive.

XQ. And there is nothing to prevent you from printing a bumper sticker relative to your disagreement with the slogan?

A. Well, I have printed a bumper sticker.

XQ. And this bumper sticker, which you placed into evidence, is this printed because you disagree with the slogan "Live Free Or Die"?

A. No, sir.

XQ. But you could print a bumper sticker relative to your disagreement with the slogan "Live Free Or Die," could you not?

A. Yes, but the State would object to it.

XQ. What makes you say that?

A. Well, if I had a bumper sticker to show my objection to the "Live Free Or Die," I would have an illustration of a dog raising his leg on the State motto.

XQ. And do you feel that there is any law which you would be breaking if you were to make such a bumper sticker and adhere it to your car?

A. It wouldn't be very dignified.

XQ. So there would be no law that you would be breaking if you were to make such a bumper sticker and adhere it to your

[37] car, would there, to your knowledge?

A. That's right. I wouldn't be breaking a law, that's correct.

XQ. At the time that you placed the tape over your license plates, where were the vehicles situated?

A. At the time I put the plates on, they were on my property, in my driveway.

XQ. Were there any members of your family watching you?

A. I can't recall. I think my children were there, yes.

XQ. Your wife was not?

A. I can't recall. No, she was in the house.

XQ. Were there any neighbors present?

A. That I couldn't tell you, if there were or not.

XQ. And did you make any statement to your children at the time you placed the tape over the motto?

A. I can't recall that, if I made a statement.

* * *

[39] XQ. Are you a Jehovah's Witness?

A. Yes, sir.

XQ. Are you a baptized Jehovah's Witness?

A. Yes, sir.

XQ. Are you a member of a Jehovah's congregation or church?

A. No, sir.

XQ. Why not?

A. Well, the reason for this is because I have been expelled or excommunicated.

XQ. Isn't the correct word disfellowshipped?

A. Yes, disfellowshipped is the same, synonymous with expelled or excommunicated.

XQ. And why were you disfellowshipped from the church of Jehovah's Witnesses?

A. Why I was disfellowshipped? Because I asked for an open hearing of a court case that they had. There was charges brought to me behind closed doors. I was disfellowshipped by a line committee, and I asked for an open hearing in front of the congregation, because I had nothing to hide. And, therefore, they disfellowshipped me because they say I caused dissension in the congregation by asking questions.

[40] XQ. And in what fellowship or church did this occur?

A. This happened in Concord.

XQ. And you were disfellowshipped from that church?

A. Yes. What does that have to do with the "Live Free Or Die" motto?

XQ. Then you came to New Hampshire, and you became a member of the Jehovah's Witnesses Church in Claremont, New Hampshire?

A. No, sir. I was never a member there.

XQ. And why did you never become a member?

A. I went to the Claremont Congregation asking for help because of problems I was having on [sic] Concord, and they said they refused to help me. They told me to go back to the

people who, you know—I told them, I says, "Look, if somebody steals a television, I call the police. You straighten it out with them." They tell me to go back to the people and straighten it out with them. They—

XQ. Did you ever go to any religious meetings of Jehovah's Witnesses in Claremont?

A. Yes, I have.

XQ. And were you ever charged by the Elders of that
[41] church with disturbing the peace, and did the Elders of that church sign criminal complaints against you for disturbing the peace during a religious meeting of the Jehovah's Witnesses Church in Claremont?

A. That's true, but they lied.

XQ. Do you recognize those?

A. No, I don't recognize any of these.

(Document handed to Mr. DePuy by Mr. Johnson.)

MR. DE PUY: No objection.

THE WITNESS: What is it? I don't know what it is.

JUDGE COFFIN: This material we are doing now, was this covered in the preliminary hearing?

MR. JOHNSON: No, it was not, Your Honor.

The State offers two criminal complaints, Claremont District Court, relative to the issue of sincerity and credibility in this case.

JUDGE BOWNES: All right.

THE CLERK: Exhibit 5.

JUDGE COFFIN: They may be marked as one exhibit. I think there are two different dates. Well, A and B. Exhibit 5A and 5B.

JUDGE BOWNES: Go ahead, Mr. Johnson.

MR. JOHNSON: Thank you.

(Questions by Mr. Johnson)

XQ. Do you object to mottos generally, Mr. Maynard?

[42] A. No, sir, not at all.

XQ. And you don't object to the motto "In God We Trust"?

A. No, sir.

XQ. And you don't object to the motto "E Pluribus Unum"?

A. I'm not familiar with that one, sir.

XQ. To your knowledge, do Jehovah's Witnesses, other than yourself, object to the motto "Live Free Or Die"?

A. No, sir, I don't know that.

XQ. There are many other Jehovah's Witnesses within the State of New Hampshire, to your knowledge?

A. I believe so, there is.

XQ. And, to your knowledge, many of them operate motor vehicles with non-commercial license plates in New Hampshire?

A. As far as I know, yes, sir.

XQ. What do the words in the motto "Live Free" mean to you?

A. Well, it means that a person should be able to—but the motto doesn't say "Live Free," it says "Live Free Or Die."

XQ. Please answer my question.

A. Could you ask the question again, please?

XQ. What do the words "Live Free" in the motto mean?

MR. DE PUY: Your Honor, I would object. I think the motto has to be taken as a whole in the abstract. The question as to what "Live Free" means—

JUDGE COFFIN: Well—

MR. DE PUY: I don't think he can break that motto up. I
[43] think all four words mean something to Mr. Maynard.

JUDGE COFFIN: This is cross-examination. Objection is overruled.

(Questions by Mr. Johnson)

XQ. What do the words "Live Free" mean to you?

A. Well, "Live Free" is to have a choice of religion, a choice of government, living free to have religious instruction for your children without being intimidated or discriminated against.

XQ. Does it mean live free in spirit or conscience to you?

A. Well, to go to Kingdom Hall to receive religious instruction, that's a literal sense, isn't it. It's just not symbolical or spiritual.

XQ. So "Live Free" may mean many things to you?

A. To me, sir?

XQ. Yes.

A. Live free from bondage, yes. Freedom means, to my understanding, a free conscience like I exercised it. I demonstrated this belief of what is free by freely taking upon myself to put the tape on the State Motto.

XQ. And would you agree that "Live Free" may mean other things to other people?

A. Yes, I agree upon that.

XQ. Just several other questions.

Is it fair to say that, at the outset of your two criminal trials
[44] relative to the violation of your usage of your motor vehicle plates, you were informed by the District Court Judge that you had the right to counsel?

A. Yes.

XQ. And, at the conclusion of the hearing on January 31, 1975, you were informed of your right to appeal from the adverse decision?

A. Not before the sentence, no, after the sentence, I was not advised.

XQ. Before the sentence, you were advised?

A. Yes, sir.

XQ. Did you understand in these criminal hearings the fact that you did have the right to counsel?

A. Yes, I had the right to counsel.

XQ. And were you informed that, if you could not afford counsel, the Court would appoint counsel for you?

A. Yes.

XQ. And did you understand it?

A. Yes.

XQ. All right. And it is a fact, is it not, that you were not, at the time of your second hearing, indigent, that is to say, without money?

A. No, I wasn't without money.

XQ. You did have finances?

A. Yes. The Judge asked me if I was going to pay the fine,
[45] and I said, "No, sir."

He says "Why, are you poor?"

I says "No, because, if I pay the fine, I would be admitting to a guilt that I feel I am not guilty of."

XQ. And your decision not to retain legal counsel was your own decision?

A. It was my free choice.

MR. JOHNSON: Right. Thank you.

REDIRECT EXAMINATION

(Questions by Mr. DePuy)

Q. Mr. Maynard, what is your understanding of what that motto is meant to mean on the license plates?

A. Well, my understanding of the motto is that, if a person is not free that he should give up life, he should commit suicide.

Q. For what purpose was that motto put on, to your understanding?

A. Well, from what I understand, the Legislature passed this bill, which is mentioned here in the news clipping of an interview of Mr. Lawton, who is one of the Legislators, and explains that in a telephone interview that the sponsor of the "Live Free Or Die" motto for license plates because the Legislature—the reason he wanted to pass this is to let people, he wanted people from other states to know that New Hampshire residents believe in fighting for democracy. And I do not
[46] believe in fighting for democracy. I believe in fighting for theocracy, which means God's rule.

Q. And you were quoting from an article that appeared in the Sunday Globe of March 23, 1975?

A. Yes, sir.

* * *

[47] Q. With regard to those two criminal complaints, with regard to the Claremont congregation, could you tell the Court what the basis of those complaints was, what action were you taking at the congregation, at the Hall?

A. Well, actually, I had deaf mute citizens living with me. When they moved up, they wanted to live with us and share expenses. They were studying the Bible with me and wanted to become Jehovah's Witnesses. I bring them with me to the congregation and translate. We are sitting in back of the congregation where no one would see us and translate word for word what they were saying so they could receive instructions. So the so-called Elders came up to me and said they didn't want me to do that, because I was a disfellowshipped or excommunicated person.

I says, well, I asked them to get somebody else to do it so these people can receive instruction. They says No."[sic]

I says "I can't stop doing this, because I feel responsible for these people."

I have a tape recording of the conversation between these people behind closed doors, and they admitted and they agreed that I could sign. But during the conversation they also said that the reason I don't comply with their thinking is that they are going to use legal means to prevent me from coming to the Hall.

[48] And I says "Well, you can do whatever you want." I says "You won't succeed."

And so they—their complaint is the fact that I caused disturbances by translating to the deaf mute in the Kingdom Hall. And so, not one time was the meeting interrupted because of this. But they interrupted the meeting by having the officer come in and have me under arrest. They interrupted the services. And I was sitting in the front of Kingdom Hall with my two children. They were asking questions and answers in front of one hundred fifty people. The officer came in and said "You are under arrest."

I says "There's no disturbance."

MR. JOHNSON: For the record, on the complaint dated September 10, 1972, the complaint records the plea of not guilty and shows no finding made.

MR. DE PUY: That's all I have.

JUDGE COFFIN: We will take a short recess.

There is no recross, I take it, Mr. Johnson?

MR. JOHNSON: No.

* * *

[50] AFTER RECESS 11:35 A.M.

MR. MIDDLETON: May it please the Court, at this time we were going to call Mrs. Maynard, and Mrs. Maynard would testify as I am going to state. I understand that the State of New Hampshire may stipulate to what her testimony would be in order to shorten the proceeding.

Mrs. Maynard, according to the stipulation that is already filed, is a co-owner of the automobile in question. She would testify that she shares her husband's religious beliefs. She has already lost her position that she held at the time that these matters began and feels threatened as a result of the more than a mere possibility of prosecution of herself if she operates the motor vehicle with the motto "Live Free Or Die" covered over in accordance with the testimony that has been received. That would be the sum and substance, Your Honors, of her testimony.

JUDGE COFFIN: We have one factual question that we would like the answer to, and that is whether—we don't know whether it is relevant or not—but whether, at the time of the

convictions in January of '75, was the tape shown to us on the license plate on the exhibit that we have, was that the kind of tape that was on the plate in those earlier convictions?

MR. DE PUY: Yes.

MR. MIDDLETON: Yes, Your Honor, it was a non-transparent either orange or red tape.

[51] Mr. Kohn also tells me that, at the time of the original prosecutions, Mr. Maynard had punched out the words "Or Die" on the license plate, the area that was covered by it, where those words were contained were covered by tape, but the words themselves had actually been punched out of the plate.

JUDGE COFFIN: And what counsel has just represented is accepted by the State as the substance of Mrs. Maynard's testimony had she personally testified?

MR. JOHNSON: The State will agree to that, Your Honor, with the qualification with regard to the fourth substantive item stated, that is, that Mrs. Maynard feels threatened if she drives the automobile with the motto taped over. I reiterate that because that is the degree to which the State will agree that she may feel threatened.

JUDGE BOWNES: Well, you agreed earlier that there is a threat of prosecution against either of them if they drive the automobile with the motto taped over. I thought you stated that earlier.

MR. JOHNSON: The law, Judge Bownes, as I understand it, is that a person is guilty of an offense who knowingly obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle. If Mrs. Maynard were herself to obscure or to permit to be obscured the State Motto—

JUDGE BOWNES: All right.

[52] MR. JOHNSON: That is the distinction I am making. If she wasn't the one who committed the act, she would not have committed the crime.

JUDGE BOWNES: Thank you. I understand now.

MR. MIDDLETON: Just to make it clear for the record, our testimony would be Mrs. Maynard permitted to be obscured these words on the license plates on the car of which she is a co-owner.

JUDGE COFFIN: Very well. Then we take it that this stipulation as to what the testimony would be is satisfactory.

MR. JOHNSON: Yes.

JUDGE COFFIN: You may proceed.

MR. MIDDLETON: The plaintiff rests. The plaintiff has no further evidence at this point.

MR. JOHNSON: The State calls Fred Clarke to the stand.

FREDERICK N. CLARKE, JR.

called as a witness in behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

(Questions by Mr. Johnson)

Q. Your name, please.

A. Frederick N. Clarke, Jr.

Q. And your employment?

A. Director, Division of Motor Vehicles, Department of Safety.

[53] Q. How long have you been so employed?

A. As the Director, since 1970.

Q. When did the State Motto first appear on our license plates in this state?

A. 1970.

Q. And, prior to that time, were there any words other than New Hampshire on the license plates?

A. In 1957 to 1962 there was the word "Scenic." In 1963, "Photoscenic." In 1964 to '69, "Scenic."

MR. JOHNSON: If it may please the Court, the various license plates which the State offered earlier in this hearing, the State would like to offer again at this time, with no objection, as I understand it, from counsel for the petitioners, the State feels that they are material to this case relative to the next witness the State will call.

JUDGE COFFIN: They may be admitted without objection.

MR. DE PUY: No objection.

JUDGE BOWNES: Exhibit No. 6.

THE CLERK: Twenty license plates.

JUDGE COFFIN: Call those Defendants' Exhibit No. 6, to keep up the series of numbers, but identify this as a defendant's exhibit.

JUDGE BOWNES: All right, Mr. Johnson.

(Questions by Mr. Johnson)

Q. Mr. Clarke, those plates that have been marked Exhibit

[54] No. 6 constitute, if I am correct, a random sampling of plates

issued by your department to motor vehicles registered in New Hampshire?

A. This is correct.

Q. Are you, in your capacity as Director of Motor Vehicles for the State of New Hampshire, familiar with plates from other jurisdictions, that is, other states in the Union?

A. Yes. We receive these yearly.

MR. JOHNSON: Your Honor, I would offer a series of plates from other states in the Union, and I believe counsel for the petitioners have no objection to these being offered.

JUDGE COFFIN: They may be admitted as Defendants' Exhibit No. 7.

JUDGE BOWNES: How many are there?

MR. JOHNSON: Eleven.

JUDGE GIGNOUX: Is "Vacation Land" in there?

THE CLERK: No, I don't think so.

JUDGE GIGNOUX: Discrimination.

MR. JOHNSON: We have intentionally excluded both our sister states to the east and west, Your Honor.

(Questions by Mr. Johnson)

Q. Commissioner Clarke, will you comment upon the problems, if any, which would be raised in your department if it were to become discretionary with an applicant for motor vehicle license plates as to whether or not the motto were to

[55] appear on his or her license plates?

A. Well, there are actually two reasons. Our license plates are made at the State Prison approximately two years in advance of the registration period. And the other one is we have designations at the top of the plate spelling out different types of plate.

Q. When will the next license plates be manufactured at the New Hampshire State Prison?

A. At the present time, I couldn't actually say, because the next two years we know we are going to decals, and they will be using the same plate they now have at the present.

Q. So it will be at least two years before new metal plates are actually made?

A. At least.

Q. Now, would there be any administrative problems relative to whether the motto appears on a plate or does not appear on a plate?

A. Well, I would have to say, from the standpoint of changing any dies at the State Prison, there definitely would be an

administrative problem, because they go up there in sequence. And, when we give them, which will be in probably about a year, it takes them about two years to give us one issue. We would have to know well in advance of maybe even three years.

Q. And how many license plates were issued in New Hampshire for the calendar year 1974?

[56] A. All told, approximately 526,000.

MR. JOHNSON: Thank you. The State has nothing further.

CROSS EXAMINATION

(Questions by Mr. Middleton)

XQ. Mr. Clarke, the license plates of New Hampshire that have been marked don't represent all the varieties of New Hampshire license plates, do they?

A. I don't think so. I have a sheet here. There's all the ones that we make at the department.

MR. MIDDLETON: I would like to offer this sheet that Mr. Clarke just produced. It shows all the license plates.

MR. JOHNSON: Fine. The State has no objection.

MR. MIDDLETON: May we have that marked, Your Honor?

JUDGE COFFIN: Yes. Do you object to that being a defendant's exhibit? Do you want this to be a plaintiff's exhibit?

MR. MIDDLETON: It doesn't matter to me.

JUDGE COFFIN: Mark it Defendants' Exhibit No. 8.

JUDGE BOWNES: What is on that sheet, Mr. Middleton?

MR. MIDDLETON: All the license plates the State of New Hampshire issues.

JUDGE BOWNES: All of the types?

MR. MIDDLETON: All of the types, yes.

(Questions by Mr. Middleton)

[57] XQ. Mr. Clarke, do you know how many different types the State does issue?

A. Well, in this area here, we try to keep the number here, the last number here, which we call plate 9,999. These two plates here would approximately be 325,000. All the rest are the numbers that are issued in each one.

XQ. All right. What I was interested in was the number of varieties that you show here on this sheet. Have you ever counted the number of different kinds of plates that New Hampshire issues?

A. No, I have never counted them.

XQ. O.K.

For motor vehicles, there's thirty-seven different plates. Does your count equal mine?

A. Thirty-nine.

XQ. Thirty-nine, O.K.

You have a sheet, I mean one list of plates which are issued to boats, and this type of thing we are not involved with today, right?

A. Right.

XQ. All right.

Now, of the thirty-nine different license plates the State issues, on how many license plates does the motto appear?

A. I would say about 325,000.

XQ. All right. But how many different types out of the
[58] thirty-nine?

A. There's only one type, as we call it, which would be the passenger car type.

XQ. O.K.

It's only on passenger car license plates that the motto appears, correct?

A. Right.

XQ. Now, one of the types of passenger car license plates that the State issues is a so-called vanity plate, is that correct?

A. Right.

XQ. And, for the benefit of the Court, this is a license plate that you customize, you produce it to satisfy an order of a particular individual, is that right?

A. Yes, that would be true.

XQ. If I wanted my initials on a license plate, I can order that. And, assuming that you haven't produced that plate for somebody else, you will produce that for me for a fee of $5.00, is that right?

A. Right.

XQ. And I assume this is something of a revenue measure, is that right?

A. All the money goes to driver education.

XQ. But the State does this to produce some income, is that right?

[59] A. That's correct.

XQ. Now, the usual license plate is the so-called County plate that is for non-commercial vehicles with the letters indi-

cating the county and then a number following that, is that right?

A. That is correct. There are 9,999, to begin with, and then we go to the letters.

XQ. And looking at your list—

JUDGE COFFIN: I didn't understand that. 9,999?

THE WITNESS: Without letters. These are called numerical. Start with 1 and go through 9999, with no designation as to which county they are in.

(Questions by Mr. Middleton)

XQ. Just so this is clear to the Court, this is a typical non-commercial license plate, is that correct?

A. Yes, sir.

XQ. On the extreme right-hand side of the plate, the H and E designate the County, is that correct?

A. They did up until last year.

XQ. O.K.

Well, up until last year, at least, this would have indicated that this car was registered in Hillsborough County, is that correct?

A. That's correct.

XQ. And then, following the County designation on this
[60] particular plate, are four numbers?

A. Right.

XQ. And what you are saying is that, before you start putting on the County designation, you issue 9,999 plates?

A. Right.

XQ. Then the letters start over here?

A. That's correct.

XQ. And so there are 9,999—

JUDGE BOWNES: That is 9,601.

MR. MIDDLETON: That has an initial on it.

JUDGE COFFIN: There is a plate that has 9,601 on it.

THE WITNESS: Yes.

JUDGE BOWNES: I see.

(Questions by Mr. Middleton)

XQ. You start with the letters?

A. That is not a typical plate. You will find one with letters that go across. We ran out, so we had to go to this here you are showing now.

XQ. Are the only kinds of license plates with both letters

and numbers those which are issued to passenger cars, non-commercial vehicles?

A. I would say that the majority are. There are a few commercial vehicles that do have initial plates, which we call the prestige plate, that you pay a fee of $5.00.

XQ. O. K. That is what I was referring to, is a vanity plate?

[61] A. Right.

XQ. Apparently, in the selection that we have here, we don't have the other kind of passenger venicle [sic] plate but which you were saying is the H and E would run?

A. Run parallel to the plate.

JUDGE BOWNES: What does the "E" stand for?

THE WITNESS: Start out with H and go up through.

(Questions by Mr. Middleton)

XQ. Again, the only kind of a plate you manufacture out of these thirty-nine different kinds that have both letters and numbers, other than a vanity plate, is the typical passenger car plate, is that correct?

A. That's right.

XQ. And, also, this is the only kind of plate that has "Live Free Or Die," as a practical matter?

A. That's correct.

JUDGE BOWNES: You said last year there were 320,000?

THE WITNESS: Approximately.

JUDGE COFFIN: Only the passengers have letters and numbers?

THE WITNESS: Right.

JUDGE COFFIN: What do the others have?

THE WITNESS: There are designations at the top with just numbers.

[62] (Questions by Mr. Middleton)

XQ. The others have only numbers. In other words, the one that seems to be here on the top is antique, and this would be typical, that it has only numbers on it?

A. Right.

JUDGE BOWNES: That means an antique car?

THE WITNESS: Yes, sir.

(Questions by Mr. Middleton)

XQ. One exception seems to be repair, which has an "X" on it?

A. Has "X," "Y" and "Z," yes.

XQ. And Junk seems to have a "J"?

A. That's right.

XQ. And, again, that is on the opposite side, is it not?

A. Well, dealer plates that have initials starting at the front, also.

XQ. Is that right on the front?

A. Yes. On the back, too.

XQ. And the dealer plates, they would have a single letter, is that right?

A. They have a single letter, either starting on the front or the back.

XQ. So, again, this kind of a plate is the only one with two letters?

A. That's correct.

[63] XQ. Now, if, as I understood your testimony a moment ago, it is important, these plates are issued by the State primarily so that you can identify the vehicle, isn't that right?

A. That is correct.

XQ. And, as I understood your testimony to Mr. Johnson a moment ago, you testified that if the "Live Free Or Die" were blanked out on this kind of a plate, it would make identification difficult, is that your testimony?

A. I would say it would in most cases because of the fact that you still have 9,999 with about twelve different categories.

XQ. O. K. But if it was one of that three hundred some odd thousand plates that are issued with the two letters on it, obviously, whether that "Live Free Or Die" appears there or not, this particular kind of a plate is readily identifiable, isn't it?

A. That is correct.

XQ. No identification problem so far as that particular kind of a plate?

A. No.

XQ. Are you familiar with the provisions of Chapter 263:1, which requires that every motor vehicle be operated with plates?

A. Yes.

XQ. And that is also the chapter and verse that requires that the State Motto be put on these plates, is that not correct?

[64] A. That is correct.

XQ. And would you read with me for a moment and see if I am reading this correctly that this particular statute requires that number plates for non-commercial vehicles shall have the State Motto "Live Free Or Die" written thereon, is that correct, is that what it says?

A. Yes.

XQ. And, as a matter of fact, there are a great many non-commercial vehicles operated in the State of New Hampshire without that motto on it, isn't that correct?

A. I would say no.

XQ. Well, let's look at some of them. And, in particular, that motto does not appear on that; that is a non-commercial vehicle, is it not?

A. Right. But there's only 700. You said a great majority. I can't feel that 325,000—there are a few in that area, but not a great majority.

XQ. But you will agree with me that, currently, there are a number of motor vehicles being operated in the State of New Hampshire with license plates, non-commercial vehicles with license plates, that do not bear the motto "Live Free Or Die"?

A. I would agree.

MR. MIDDLETON: Thank you.

REDIRECT EXAMINATION

(Questions by Mr. Johnson)

[65] Q. Mr. Clarke, the Attorney General of the State of New Hampshire has a license plate saying Attorney General, does he not?

A. Yes, sir.

Q. And does the motto appear on that?

A. No.

Q. There is no special license plate for Assistant Attorney General, is there?

A. Not at present.

Q. And the Judge of the United State District Court for the District of New Hampshire, is there a special license plate for that Judge?

JUDGE COFFIN: Other than antique.

JUDGE GIGNOUX: Or junk.

THE WITNESS: I do not feel we have one at this time.

JUDGE BOWNES: I will state for the record that my license plate says New Hampshire Judicial. And there is no State Motto on it. It, of course, means that New Hampshire Judicial is much superior to the judicial situations in Maine.

MR. JOHNSON: Thank you, Mr. Clarke.

The State has nothing further.

JUDGE BOWNES: I don't think it is a special plate, because I have to apply every year and pay $5.00 for it.

THE WITNESS: We call it initial plate.

MR. JOHNSON: Just one question.

[66] (Questions by Mr. Johnson)

Q. Mr. Maynard testified he discussed with you the matter of obtaining a commercial plate for a station wagon. Did you ever have such a discussion with him?

A. I think Mr. Maynard talked with the Commissioner of Safety, and I never met Mr. Maynard and never had a discussion with him.

JUDGE BOWNES: Judge Gignoux has a question.

JUDGE GIGNOUX: I am trying to clarify your plate. Does it have numbers?

THE WITNESS: No.

JUDGE BOWNES: Judicial 1 is retired Judge Blandin. and initial 2—

JUDGE GIGNOUX: This is one of the vanity plates?

THE WITNESS: We have to have a special die.

JUDGE GIGNOUX: Do any vanity plates have the motto on it?

THE WITNESS: Those three don't. Anyone who has initials or a name on it has the motto.

MR. MIDDLETON: Could I ask one further question?

RECROSS EXAMINATION

(Questions by Mr. Middleton)

XQ. You were asking Mr. Clarke about the vanity plates. I take it that people order these vanity plates and received delivery on them the same year. They don't have to wait two or three

[67] years to get a vanity plate?

A. We issue a paper plate, to begin with.

XQ. And it takes a matter of a month or two to get the metal?

A. I would like to say it takes in the vicinity of ten days or thirty days, depending on the present industry.

XQ. As far as the cost of this is concerned, how much does it cost to do this; $5.00 is the total charge to the individual for the vanity plate?

A. Right. It is called a service fee of $5.00. It goes completely to the driver education fund, so ear-marked.

XQ. Somebody in the State Prison has to set up a certain die to make this plate?

A. That's correct.

XQ. Presumably, the person to make up the die, to make

the initial die, could remove the die that says "Live Free Or Die"?

A. I would say so.

JUDGE GIGNOUX: Would it take more than ten days to get a plate without "Live Free Or Die"? Any reason it takes more time than it takes to make a vanity plate?

THE WITNESS: No, I wouldn't say it would take any more time.

JUDGE COFFIN: Thank you.

(The witness left the stand.)

MR. JOHNSON: The State has one final brief witness. Chief Wooley.

[68] NEIL WOOLEY

called as a witness in behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

(Questions by Mr. Johnson)

Q. Your name, please?

A. Neil Wooley.

Q. And are you the Chief of Police in the Town of Lebanon, New Hampshire?

A. Yes, I am.

Q. And for how long have you been the Chief of Police?

A. Slightly over three years now.

Q. Are you the local prosecutor who prosecuted the complaints before the Lebanon District Court against Mr. George C. Maynard?

A. The first one.

Q. Chief Wooley, how long have you been a police officer in New Hampshire?

A. Approximately nine and a half years.

Q. Is it fair to say that part of your work as a law enforcement officer is the identification of motor vehicles through their license plates?

A. Yes, it is.

Q. If a piece of non-transparent tape appears across the top of a license plate, as appears in Petitioners' Exhibit No. 1,

[69] would you comment upon any difficulty you might have in identifying that vehicle?

A. Yes. The designation has been pointed out, such as the

word commercial, tractor, trailer, antique, these are all visible means by which myself, as a police officer, would be looking for on a plate attached to any vehicle. There are numerous occasions where people use what we commonly refer to as a screw-driver transfer, where any set of plates or plate may be attached to a vehicle that is not assigned to that vehicle. The specific occasion that I personally was involved in was the use of I believe it was a trailer plate attached to a motor vehicle, a pleasure car. The fact that the word "trailer" was visible gave me an immediate indication that that plate did, in fact, not belong on a pleasure car. And without the words or some distinguishing marks, it becomes more difficult for a police officer to visually look at a car and a plate, or whatever the vehicle may be, and determine whether or not that plate may, in fact, belong on that vehicle.

Q. I presume that some of your work relative to the identification of vehicles through their license plates is undertaken during the nighttime?

A. That is correct.

Q. To your knowledge, are there other states having license plates with colors similar to this shade, to that of the State of New Hampshire?

[70] A. Yes, there are. Given the fact that we may change the color system from year to year, or periodically, there still are several states that, whether because of lighting conditions, dirty plates or weather conditions, whatever the case may be, other plates may be to a distance distinguishable—I'm sorry, undistinguishable as to the State.

Q. In other words, for the benefit of the Court, when our license plates are physically changed, instead of being white lettering and figures on a green background, we have green letters and figures on a white background?

A. That is correct.

Q. And the State of North Dakota, in 1975, has a white background with green letters?

A. That's correct.

Q. Does the motto "Live Free Or Die," as appears at the top of the license plate, facilitate in any manner your ability to identify a motor vehicle as having been or being registered in New Hampshire?

A. Yes, by virtue of the fact that I know of no other state

which issues a plate with that motto or those words attached to it.

Q. And, in particular, am I correct, based on what you just said, you could easily identify this as being a New Hampshire license plate because it has the motto "Live Free Or Die" as opposed to this which has the motto at the top, being a Ne-
[71] braska plate, "Cornhuskers State"?

A. That's correct.

JUDGE COFFIN: You are talking now about completely different colors. One is red on white, and this is white on green.

(Questions by Mr. Johnson)

Q. Or, for instance, North Dakota, which has at the top N. D., and at the bottom it says "Peace, Garden State"?

A. Yes.

* * *

[76] (Argument of Mr. Kohn.)

I want to emphasize that is not the situation we have here. We are not attempting to turn this court into an Appellate Court for its State convictions.

On the first two charges, Mr. Maynard was convicted. He served his time. By the time he came to me, as ACLU attorney for New Hampshire, February 28th, over thirty days passed, there wasn't even a possibility of bringing an appeal at that point.

With respect to the other pending prosecution, in all candor, I did not find out about that until after we appealed before you, Judge Bownes, and secured a temporary restraining order. I had understood all of the prosecutions were over with and Mr. Maynard served his time, and that was it. As it turned out, I was negotiating the State with an agreement statement of facts. They did send over a copy of the other pending State criminal actions, the first time I learned of it. But the fact remains that Mr. Maynard was never sentenced for that offense. And, under New Hampshire law, sentencing is a predicate to an appeal. So
[77] Mr. Maynard was forced into a situation where he either had to abjure his religious beliefs and drive the car with the motto on it or continue to drive with the motto covered up, for which he had been prosecuted three times, or leave the state.

JUDGE GIGNOUX: Couldn't he have made a motion, request that sentence be imposed, appeal from that sentence,

which I understand would then entitle him to a de novo trial under New Hampshire law, and have this question certified to the Supreme Court?

MR. KOHN: I think if Mr. Maynard had been represented by an attorney at the time—

JUDGE GIGNOUX: But he is represented by an attorney now.

MR. KOHN: That's correct.

JUDGE GIGNOUX: Could you go over to the New Hampshire Supreme Court and move for sentence at this time?

MR. KOHN: Yes, I suppose we could do that.

JUDGE GIGNOUX: Then appeal. Do I understand correctly there would then be a de novo trial in the Superior Court?

MR. KOHN: This is correct, Your Honor, which forms the basis for another argument that we have why Younger shouldn't apply in this case. The New Hampshire system, appellate system, is a two-geared system. No way you can try a case on the facts in the District Court and go directly to the Supreme Court with a record. Mr. Maynard would have to ask
[78] to be sentenced, which I think is a very unfair posture to put a defendant in a criminal case in, anyway. He would then be in a position to exercise his right to appeal to the Superior Court, where eventually he could secure a trial. That may consume four months or five months. And, if he lost in the Superior Court—

JUDGE GIGNOUX: I understand in Superior Court there is a procedure by which the Superior Court Justice could certify this question directly to the New Hampshire Supreme Court.

MR. KOHN: Yes, sir. The questions may be certified up, and I understand this can even be done in the District Court if justice determines it. The problem is you have no record. The District Court is not a court of record in the sense that a transcript is kept. And it seems to me terribly important, when you are making sophisticated arguments based on the free exercise clause, and based on other problems, that there be a factual record for the Court so that the Court can put the issues in a proper frame of mind.

JUDGE GIGNOUX: There would be a record in the Superior Court?

MR. KOHN: Yes. But if you went through a trial in Superior Court and had an adverse ruling, you might as well

take your normal appeal to the Supreme Court.

JUDGE BOWNES: Mr. Kohn, the real reason you haven't asked for sentence is the Hoskin case. You have that case staring you in the face. Isn't that the real reason you have
[79] come over here?

MR. KOHN: No.

JUDGE BOWNES: I am talking about the New Hampshire Supreme Court decision.

MR. KOHN: The reason I came over here is, at the time Mr. Maynard came to me, I understood he served his time, and the only prosecution pending—yes, you are right. The Supreme Court of New Hampshire has already indicated which way it would go on the questions, although it has not resolved the specific questions of Mr. Maynard's case, and that was not a consideration in my mind. You know, I had a right to go to the Federal Court. The issues could be raised here. And, when Mr. Maynard came in and, you know, the sensitiveness, I chose to file my case in Federal Court. Yes, it is true, I was aware of the Hoskin case. I know the New Hampshire Supreme Court has had similar issues before it, and I did make a choice to come here, which I believe is my prerogative.

Now, the other crucial point I want to make about the framework of our case here is that we are not asking for an injunction against any pending prosecution. And in every case that has been before the Supreme Court, perhaps except Hicks v. Miranda, which was decided in, I believe, the last decision day of the term, the defendant in a criminal prosecution had been convicted or couldn't seek what he felt was proper redress there and pled guilty in one case. And then, instead of utilizing
[80] the State appellate procedure, had gone into Federal Court and sought to enjoin the pending criminal action, or in one case to have his criminal records expunged. But, in every case, it was connected to a proceeding that was pending in State Court. It is not the relief that we are seeking here. We have asked the Court for prospective relief only that the Court declare that the statutes as applied to Mr. and Mrs. Maynard are unconstitutional and an injunction be issued to the Commissioner of the Motor Vehicles Department ordering him to supply him with a license plate that does not offend their religious beliefs.

As far as two of his prior convictions are concerned, he was convicted, served his time. As far as the case that is still pending, he had never been sentenced for it, and I understand

from brother New Hampshire counsel that the likelihood is he never will be sentenced on that charge. If he is sentenced then, and if this Court would uphold it and an injunction were to issue, I suppose at some point in the future we would be faced with making a res judicata argument in State Court or pursuing that case up through the State Court. It is highly speculative. I don't know what is going to happen, and I don't believe a defendant should go to the State Court and ask to be sentenced so he can exercise certain rights. I think that responsibility is on the part of the State, and neither the Court nor the prosecution has had any attempts to have him sentenced for an offense. And even if he were sentenced, it would still not solve the problem
[81] for future arrests, prosecutions, fines which would not be paid, and, inevitably, imprisonment. We would still be faced with that problem. I never heard of a case yet where a District Court in a criminal prosecution has issued an injunction against the State against future prosecutions pending eventual resolution in the State Court. As a matter of fact, the only other alternative I have been able to think of is, I suppose, we could have filed suit for declaratory judgment in the State Court and hope that would get resolved before Mr. and Mrs. Maynard were subjected to further criminal penalties. Again, there is certainly no requirement that be done. We chose to file in Federal Court, and I think we are properly here.

* * *

[84] But I do want to emphasize much is made of this, that by my theory it makes no difference whether Mr. Maynard was advised by Judge Lovejoy he had a right to counsel in the District Court or not. The essential thing is that he was not represented by counsel. You do not have an attorney making a calculated decision to try to get into Federal Court and use it as a State Appellate Court, and that is the crux of our argument that Younger doesn't apply.

JUDGE GIGNOUX: Well, the problem, one problem I suggest is that he did have counsel at the time this action was started, and counsel at that time made a calculated decision rather than requesting the imposition of sentence and appealing through the State process, he would come into Federal Court.

MR. KOHN: No, sir, that is not what happened. I want to make sure it is absolutely clear.

At the time Mr. Maynard came to me, and at the time we filed our complaint and applied for a temporary restraining order, I did not know about that third pending action. And, if I had known about it, in restrospect, I don't think it would have made any difference. The fact of the matter is I didn't know about it. And, when the Maynards came to me I thought we had a clear exception to the Younger problem here.

[85] O.K. We thoroughly briefed the merits of the case, and I am mindful that the Court is behind in its time. If the Court has any specific questions, you know, of us in terms of our free exercise claims or our First Amendment claims, I would be happy to deal with them, but I'm not sure it would be beneficial for me to repeat our arguments.

JUDGE GIGNOUX: I would like to clarify my own thinking. I understand you make basically two arguments. One is on Barnette principles.

MR. KOHN: Yes, sir.

JUDGE GIGNOUX: That the First Amendment free exercise clause protects the Maynards from having to affirm a motto or slogan they do not believe in, is that right?

MR. KOHN: That's right.

JUDGE GIGNOUX: That is one.

And the other is symbolic speech.

MR. KOHN: Yes, sir.

JUDGE GIGNOUX: Tinker v. DesMoines case, that line.

MR. KOHN: Yes, sir.

JUDGE GIGNOUX: That is not the free exercise clause you are speaking of?

MR. KOHN: There are two separate arguments.

JUDGE GIGNOUX: That is what, free speech?

MR. KOHN: That's right.

JUDGE GIGNOUX: Now, I noted when we heard this

[86] tape of the first District Court hearing there is no mention of symbolic speech by Mr. Maynard along the lines of his testimony here today, and it occurs to me that Mr. Maynard had not conceived of the symbolic speech approach until very competent expert counsel called his attention to Tinker and O'Brien and some of these other cases. Am I unduly suspicious?

MR. KOHN: No, sir, I think that Mr. Maynard has a sincere belief based on his religious grounds.

JUDGE GIGNOUX: I am not questioning his sincerity at

this point. But was he, at the time he acted here, was he doing anything other than covering up a motto which he didn't believe in?

MR. KOHN: I believe he testified to that, and I think—

JUDGE GIGNOUX: I know he did, but he didn't at the District Court hearing. You quarrel about his colloquy with the State Judge.

MR. KOHN: I can't answer that question, Your Honor, because I don't know, except from what we heard on the tape. I assume that is all he said. And I think that Mr. Maynard does see these things in a religious framework. Naturally, when we brought this action, you know, we tried to advance every legal theory that we could that would cover the situation. And, you know, I think that Barnette itself, which was originally conceived to be a case based on religious principles, has been further broadened in the Russo case in New York and the ears

[87] to expand the whole flag salute notion to a free speech issue, and I think the two things can be inextricably mingled and very difficult to separate out, whether it is a symbolic speech, you know, argument, or whether.

* * *

(Argument of Mr. Johnson.)

[94] JUDGE COFFIN: Supposing this case came up a year from now, and somehow they managed to get along in the interim, but at that point of time the pending New Hampshire case would have been pending without sentence for a year and a half. Is there no limit to the delay that a Federal Court must impose upon itself so long as the last docket entry in a State case shows that there is no sentence yet imposed?

MR. JOHNSON: In response to your question, Judge Coffin, I think that there would be a period after which this

[95] Court might consider that there no longer was a case pending and might assume jurisdiction. The position of the State, however, is that, on the third case against Mr. Maynard, the fact of the matter is that he was found guilty. And, if the Court will notice on the attested copy of the District Court complaint, in that section concerning sentencing, the Court has checked off the line "continued for sentencing." The position of the State is that the criminal offense charged in that third complaint was tried, a finding of guilty was entered, and the sentence was that of continued for sentence, and with the result that it is incorrect

and improper to say that that third offense is in fact still pending.

JUDGE COFFIN: But what does that mean, continued? You are saying now that the sentence was the type of sentence which we call continued for sentence.

MR. JOHNSON: Yes, Judge.

JUDGE COFFIN: But, to me, that connotes something yet to follow. Any defendant with that notation, he would be then—that is final as to him. His sentence can never be changed from that.

MR. JOHNSON: It is final in the sense that he may never be brought back into court on that particular complaint. If, however, Mr. Maynard were to have been brought back into the same court or another court on a fourth complaint, then the Judge may take the third complaint, which he marked con-
[96] tinued for sentencing, and bring it forward and impose sentence in light of the fourth criminal complaint. But in terms of the third criminal complaint still pending, in terms of our practice and procedure in this state, if we do not consider a complaint that has been filed, tried, a finding of guilty or innocent entered thereon, and the sentence marked continued for sentence, is still pending.

The State also would point out that, not only did Mr. Maynard fail to utilize the direct transfer of questions of law to the Supreme Court for a hearing de novo to the Superior Court, but if, in fact, he was concerned with his livelihood, his use of his car, our Superior Courts have the jurisdiction, as this Court does, to issue temporary restraining orders and temporary injunctions. Likewise, so does our New Hampshire Supreme Court. Mr. Maynard sought none of this relief in our appellate system.

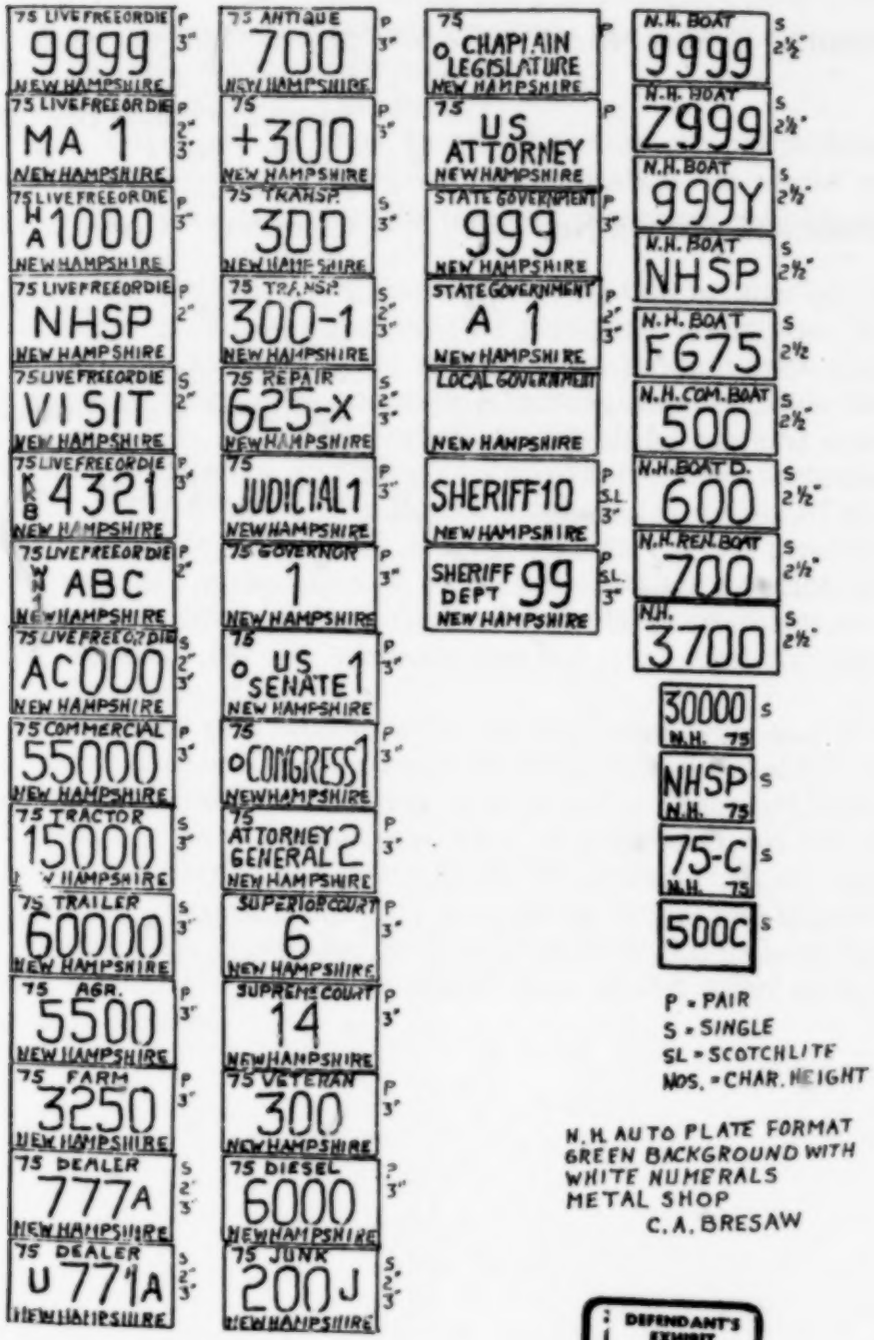
LIST OF EXHIBITS

Hearing September 22, 1975

Plaintiffs' Exhibit No.	1	-	Maynard license plate
	2	-	Summons, 12/28/74
	3	-	Tape of Lebanon District Court, 12/6/74
	4	-	Bumper sticker
Defendants' Exhibit No.	5A	-	Criminal Complaint, 9/19/72
	5B	-	Criminal Complaint, 9/10/72
	6	-	20 NH license plates
	7	-	11 out-of-state license plates
	8	-	Outline of State issued plates

United States District Court for the District of New Hampshire

EXHIBIT NO. 8



UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

OPINION
Filed February 9, 1976

COFFIN, *Chief Judge*. This is an action instituted pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief against the enforcement of NHRSA 262:27-c, which makes it a crime to obscure the words "Live Free or Die" on New Hampshire state license plates. Plaintiffs, George and Maxine Maynard—both Jehovah's Witnesses—state that they have political and religious objections to operating a motor vehicle which displays this motto, and they contend that the enforcement of the New Hampshire statute against them is contrary to the First and Fourteenth Amendments of the United States Constitution. George Maynard has, on three occasions in the past, been arrested, prosecuted, and convicted for violating the statute in question. The plaintiffs seek a declaratory judgment that, as applied to them, NHRSA 262-27-c is contrary to the United States Constitution, an injunction against any future arrests and prosecutions, and an injunction requiring that, in future years, they be issued plates that do not contain the motto "Live Free or Die". The single district judge granted plaintiffs' prayer for a temporary restraining order enjoining future arrests and prosecutions. Because the action seeks an injunction against the enforcement of a state statute on the grounds of its unconstitutionality, a three-judge court was convened pursuant to 28 U.S.C. §2281.

Since 1969, NHRSA 263:1 has required that all number plates for non-commercial vehicles, with some exceptions, shall have the state motto "Live Free or Die" embossed on them.[1] NHRSA 262:27-c (Supp. 1973), makes it a misdemeanor knowingly to obscure the figures or letters on the license plates,

1. The New Hampshire state motto, which is reminiscent of the words of Patrick Henry—"[B]ut as for me, give me liberty or give me death."—derives from the words of Major General John Stark, reputed to have been written in 1809 as part of a toast in a letter to former comrades-at-arms: "Live free or die; death is not the worst of evils." Moore, *A Life of General John Stark of New Hampshire* 500 (1949). New Hampshire adopted "Live Free or Die" as its state motto in 1945, and in 1969, it passed a law requiring that, as of 1971, the motto must appear on most non-commercial plates.

and under New Hampshire law, the "letters" include the state motto. *State* v. *Hoskin*, 112 N.H. 332, 295 A. 2d 454 (1972).[2]

The plaintiffs own two automobiles. Beginning in March or April, 1974, they began covering the "Live Free or Die" on their license plates with tape—usually reflective red tape. Beginning in late 1974 Mr. Maynard was arrested three times for violating NHRSA 262-27-c. His first arrest took place on November 27, 1974. He appeared in Lebanon District Court pro se on December 6, 1974 at which time he explained that he had religious objections to displaying the motto on his license plate.[3] The court found him guilty and fined him $25, but suspended the fine during "good behavior". On December 28, 1974, Mr. Maynard was issued his second summons; and on January 31, 1975, he again appeared in court pro se. He was found guilty, fined $50, and sentenced to the Grafton County House of Corrections for six months. The court suspended the prison sentence. After trial, Maynard advised the court that he would have to refuse to pay the fines, which totalled $75, as a matter of religious conscience. The court then ordered him committed to the House of Corrections for a period of fifteen days. Prior to his incarceration, Mr. Maynard had on January 3, 1975 received his third summons for violating the statute. He was also found guilty by the court of this offense on January 31, 1975, but sentencing was continued. At oral argument, counsel for the state defendants informed us that, in this context, "continued for sentencing" is a final sentence under New Hampshire law. No collateral consequences will attach as a result of it unless Mr. Maynard is arrested and prosecuted for the violation of NHRSA 262:27-c at some time in the future.[4]

2. In *Hoskin*, the New Hampshire Supreme Court held that NHRSA 262-27-c is not repugnant to either the due process clause or the First Amendment of the federal Constitution. In *Hoskin*, unlike the case at bar, the appellants did not contend that the act of covering the motto constituted symbolic speech that is protected by the First Amendment. Their First Amendment argument, which the New Hampshire Supreme Court rejected, was that the statute in question penalized them for exercising the right, recognized in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943), to be free from a required affirmation of belief.

3. Mr. Maynard states that his religious objection to displaying the state motto is that "[b]y religious training and belief, [he] believe[s] that [his] government—'Jehovah's Kingdom'-offers everlasting life. It would be contrary to that belief to give up [his] life for the state, even if it meant living in bondage." He refuses to be coerced by the state to advertise a slogan which he finds morally, ethically, religiously, and politically abhorrent. Maxine Maynard testified that she shares her husband's views.

I. *The Applicability of the Doctrine of Equitable Restraint*

The state defendants contend that we are precluded considering the constitutional merits of plaintiffs' claim by the doctrine of equitable restraint of *Younger* v. *Harris*, 401 U.S. 37 (1971). We disagree. *Younger* held that, in all but the most exceptional circumstances, a federal court should refuse to enjoin an ongoing criminal prosecution. Here, however, plaintiffs do not seek to enjoin a pending criminal prosecution. Their primary objective is to obtain declaratory and injunctive relief against future arrests and prosecutions. It is well established that where a federal plaintiff desires protection against threatened state prosecution of a constitutionally protected course of conduct in which he proposes to engage, a federal court can grant equitable relief. *Doran* v. *Salem Inn Inc.*, 422 U.S. 922, 931 (1975) (preliminary injunction); *Steffel* v. *Thompson*, 415 U.S. 452 (1974) (declaratory judgment). We believe that where, as here, the federal plaintiffs assert that enforcement of state laws against them would violate their First and Fourteenth Amendment rights and where, as here, state officials fully intend to enforce those laws, it is entirely appropriate that this court entertain plaintiffs' claim for injunctive relief.[5]

Defendants do not dispute that the *Younger* doctrine permits federal injunctive relief against threatened arrests and prosecutions. Rather, they contend that Mr. Maynard is barred by his failure to appeal any of his three state convictions. For this proposition, they rely upon *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). There, the Court held that the federal plaintiff was barred because it had chosen not to avail itself of its state appellate remedies, but, instead, had instituted suit in the federal court to obtain relief from a state court judgment. *See also Ellis* v. *Dyson*, 421 U.S. 426, 439-43 (1975) (Powell, J., dissenting). *Huffman*, however, is readily distinguishable. *Huffman*,

4. The time for appeal from Mr. Maynard's convictions had expired before plaintiffs filed the present action on March 4, 1975.

5. The court finds, as the state defendants concede, that both plaintiffs are under a sufficient threat of prosection [sic]to present a justiciable [sic] controversy. *See Steffel* v. *Thompson*, *supra* at 459; *Younger* v. *Harris*, *supra* at 42.

like *Younger*, was a case in which granting the requested injunctive relief would have interfered with the processes of the state court by nullifying prior or pending state court proceedings. Here, no such interference can result. Plaintiffs are not collaterally attacking Mr. Maynard's state court convictions.[6] The relief they seek is purely prospective. Therefore, neither *Younger* nor *Huffman* requires that we stay our hand; indeed, since plaintiffs have demonstrated that they will suffer irreparable harm if we do not intervene and have stated a substantial constitutional claim, it is our responsibility to hear the case. *Cf. Zwickler* v. *Koota*, 389 U.S. 241, 247-48 (1967).

Even if the doctrine of equitable restraint barred Mr. Maynard's suit, we would still have to consider whether it bars Mrs. Maynard's action. She has an ownership interest in the Maynard family cars and, accordingly, is under a separate threat of prosecution. *Cf. Steffel* v. *Thompson*, *supra* at 459. This is not a situation "in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any of them", *Doran* v. *Salem Inn, Inc.*, *supra* at 928. *Doran* suggested that such a situation might be presented where plaintiffs are brother-sister corporations related "in terms of ownership, control and management". *Id*. Here, however, each of the Maynards is acting on his or her own independently held religious precepts. There is no suggestion that either controls the actions or beliefs of the other. The relationship between these plaintiffs is thus much closer to that presented in *Steffel* v. *Thompson, supra*.[7] In our

6. A more plausible position for defendants to take would be that Mr. Maynard's state convictions bar litigation of the federal constitutional issues. Although more plausible, this argument too fails. The first circuit has held that a state criminal conviction will have a preclusive effect in a federal civil rights action only with respect to matters actually litigated and decided at the state criminal trial. *Mastracchio* v. *Ricci*, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975). Since the constitutionality of the state statutes was not litigated by Mr. Maynard in the state misdeameanor [sic] proceedings, collateral estoppel principles do not preclude this court from considering this issue.

7. In *Steffel*, two persons engaging in antiwar hand-billing outside a shopping center were threatened with state prosecution. One stopped, but the other continued and was arrested and charged with criminal trespass. While this state prosecution was pending, both filed a civil rights action in federal court seeking declaratory relief. The court held that while the one who had been arrested was barred by the *Younger* doctrine, the other remained free to present his federal claim. *See Doran* v. *Salem Inn, Inc.*, *supra* at 928.

view, therefore, Mr. Maynard's failure to appeal his state convictions could not bar Mrs. Maynard's federal action for protection from future state criminal prosecution.

II. *The Constitutional Merits*

Plaintiffs' principal contention is that the New Hampshire statutes cannot be enforced against them consistent with the First Amendment of the federal Constitution, which, of course, is applicable to the states.[8] They maintain that their act of masking over the words "Live Free or Die" is constitutionally immune from state regulation because this act was done to avoid a required affirmation of belief, under the rule of *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943); and because their act constituted symbolic speech, as to which New Hampshire cannot demonstrate a sufficient interest to regulate. *See Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). Since we accept plaintiffs' contention that their acts constituted constitutionally protected symbolic speech and that the state cannot prosecute them for masking the motto, we need not consider whether their First Amendment right to be free from a required affirmation of belief is implicated.[9]

We begin by identifying the public and private interests that are at stake. Although the act of covering the motto on a license plate may, in some cases, be an act of pure whimsy, it is clear that plaintiffs' act of masking the motto with reflective red tape is motivated by deeply held, fundamentalist religious beliefs that death is an unreality for a follower of Christ and, to a lesser extent, that it is wrong to give up one's earthly life for the state, even if the alternative is living in bondage. Plaintiffs' act of covering the "Live Free or Die" accomplishes two closely interrelated objectives: it relieves them of the burden of displaying a message which offends their beliefs, and, at the same time and more importantly, it communicates their strong disagreement with implications of the message. We have no doubt that plaintiffs' interest implicates the First Amendment. What-

8. Plaintiffs also rely upon the due process and equal protection clauses of the Fourteenth Amendment. Because plaintiffs' First Amendment claim is dispositive, we do not address these alternate claims.

9. Judge Bownes would also rest our decision on the ground that NHRSA 262:27-c violates plaintiffs' right to be free from "compelled affirmations of belief".

ever else may be said about the motto "Live Free of[sic] Die", it expresses philosphical [sic] and political ideas. Plaintiffs' desire not to be aligned with these ideas falls within the ambit of the First Amendment.[10]

The state interests promoted by the requirement that New Hampshire passenger cars display license plates bearing this motto are essentially twofold. First, the state believes that the dissemination of the motto and the association of it with New Hampshire serves a number of values: fostering appreciation of state history and tradition; creating state pride, identity, and individualism; and promoting tourism. Second, the presence of the motto on the plates aids in the identification of New Hampshire passenger cars. To permit individuals to mask the "Live Free or Die" on their plates would frustrate the attainment of these objectives. Whether these state interests are sufficient to justify the restriction on plaintiffs' activity will be considered below.

Plaintiffs' contention is that their act of masking the "Live Free or Die" on their license plates constitutes symbolic speech and that the New Hampshire defacement statute, NHRSA 262:27-c, is invalid as applied to them because it is not supported by any state interests that are sufficiently important to justify the restriction of protected expression. We agree.

This claim is based principally on two recent opinions of the United State Supreme Court invalidating state limitations on the exercise of "symbolic speech". In *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court held it a violation of the First and Fourteenth Amendments for public school officials to discipline students for wearing black armbands to school in protest of United States involvement in Vietnam. In *Spence* v. *Washington*, 418 U.S. 405 (1974) (per curiam), the Court overturned appellant's conviction for "improper use" of an American flag where, in May, 1970, shortly after the invasion of Cambodia and the shootings at Kent State University, appellant had taped a peace symbol onto an American flag and hung it upside down from his window. *See Cline* v. *Rockingham County Superior Court*, 502 F.2d 789 (1st Cir. 1974). In each case, the Court concluded that the claimant's act was sufficiently imbued with the elements of communication to be within the ambit of the First Amendment and that the state interests relied upon were insufficient to justify the restrictions on the protected expressions.

We are satisfied that plaintiffs' acts of covering the motto "Live Free or Die" constitutes symbolic speech within the meaning of *Tinker* and *Spence*. The use of reflective red tape to mask the motto is clearly intended to call attention to the fact that the motto has been obscured and thereby to communicate plaintiffs' disagreement with it. The context of plaintiffs' actions, which is important in determining their communicative quality, *see Spence* v. *Washington*, *supra* at 410, is such that plaintiffs' message is likely to be readily understood. New Hampshire citizens are well aware that the motto "Live Free or Die" apppears on the license plates of passenger cars registered in that state, and the likelihood is great that they will interpret plaintiffs' obliteration of the motto as an expression of their conscientious objections to its implications.[11] Since plaintiffs' actions are intended as expression and readily perceived as such, we conclude that they are seeking to enjoin "a prose-

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10. The defendants contend that the significance of "Live Free or Die" is primarily historical and that the motto is, in any event, so ambiguous that any First Amendment interest plaintiffs assert is *de minimis*. We do not deny the historical significance of New Hampshire's motto, but this significance is necessarily related to the philosophical and political ideas that have been so important in American history, *see* note 1 *supra*, but which plaintiffs are not compelled to endorse. Although the vast majority of, if not all other, state mottoes seem to lack idiological content, "Live Free or Die" has obvious political and philosophical significance for many. The New Hampshire motto may not be as politically charged as other slogans that might be placed on license plates, e.g., "Amnesty Now", but we can conceive of no neutral principle which would permit us to distinguish "Live Free or Die" from such others.

11. There is, moreover, evidence in the record that, at least since the decision of the New Hampshire Supreme Court in *State* v. *Hoskin*, *supra*, handed down in 1972, New Hampshire citizens have been generally aware that individuals like the plaintiffs have been covering the "Live Free or Die"on their license plates in order to express their opposition to the motto's implication that political freedom is the greatest good. This consideration supports our conclusion that the likelihood is great that observers will understand the significance of plaintiffs' acts.

cution for the expression of an idea through activity." *Spence* v. *Washington*, *supra* at 411.[12]

Having found symbolic speech, we now consider the sufficiency of New Hampshire's justifications for the statute. In *United States* v. *O'Brien*, 391 U.S. 367 (1968), upholding the respondent's conviction for knowing destruction of his draft card, the Supreme Court developed a four-part test for determining whether a government regulation restricting the freedom of expression protected by the First Amendment is justified. The Court stated, *id*. at 377:

> "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

We find that the defacement statute fails to meet two of the four components of the *O'Brien* test. The state has asserted that the statute serves two purposes: facilitating vehicle identification and promoting appreciation of history, state pride, individualism, and tourism. The effectuation of these objectives is within the constitutional power of the state and furthers important and substantial governmental interests. These justifications, however, fail to satisfy the third and fourth requirements of the *O'Brien* test.

The defacement statute furthers the New Hampshire interest in promoting appreciation of history, state pride, and tourism by preventing individuals from covering over the motto and

12. Defendants contend that it will follow from our holding today that individuals will be free to cover up the mottoes on any state's license plate if they can conceive of some possible political or philosophical opposition to the motto. We reject this suggestion. Plaintiffs have succeeded in establishing that symbolic speech is involved in this case because they have shown not only that they intended to convey a message by their act but also that the message was likely to be understood. They were able to make this latter showing principally because the New Hampshire motto itself possesses obvious political and philosophical significance. We doubt that symbolic speech could be shown in this type of a case when the motto has no such significance.

thereby ensuring the widest possible dissemination of the message contained therein. This interest is directly related to the suppression of free expression within the meaning of *O'Brien*. Although a government may perhaps single out certain messages for special protection when they appear on public property, *see Spence* v. *Washington*, *supra* at 408-09, *Spence* teaches that the governmental interest in preventing individuals from interfering with the communication of the state sponsored message by engaging in symbolic expression is not an interest that meets the third requirement of the *O'Brien* test. *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1506-08 (1975). In *Spence* the Court indicated that the state interest in preventing interruption of the set of messages conveyed by the flag was directly related to the suppression of free expression. 418 U.S. at 412-14 & n. 8. The fact that plaintiffs' act, unlike that of the defendant in *Spence*, is the only practical alternative to displaying the motto indicates that the statute and the suppression of freedom of expression are even more closely related in the present case than in *Spence*.

Second, even if the statute's other objective—requiring that "Live Free or Die" appear on all cars in order to facilitate identification of New Hampshire passenger vehicles—might be considered unrelated to speech, this purpose clearly fails the fourth requirement of *O'Brien*: the defacement statute's effect on plaintiffs' First Amendment freedoms is certainly "greater than is essential to the furtherance of that interest". It cannot be seriously contended that the state of New Hampshire has, to use the words of *O'Brien*, *supra* at 381, no alternative means that would more precisely and narrowly assure preservation of its interest in facilitating vehicle identification. Surely it need not structure its system of vehicle identification so that individuals will have to display a motto to which they are philosophically opposed. That the presence of this motto on the license plates is required for identification is belied by the fact

that only passenger cars are required to have license plates that contain the motto "Live Free or Die".[13]

Since New Hampshire's interest in the enforcement of its defacement statute is not sufficient to justify the restriction on plaintiffs' constitutionally protected expression,[14] we hold that as applied to plaintiffs NHRSA 262:27-c abridges the rights protected by the First and Fourteenth Amendments.

III. *Relief*

For the reasons stated above, defendants are enjoined from arresting and prosecuting plaintiffs at any time in the future for covering over that portion of their license plates that contains the motto "Live Free or Die". Although there is evidence that New Hampshire could easily issue plaintiffs license plates that do not contain the motto—the state presently manufactures vanity plates to order at a cost of $5—we decline to issue an injunction ordering the state officials to do so. The relief we have ordered should fully protect plaintiffs in the exercise of

13. Defendants suggest that, whatever the merits of placing "Live Free or Die" on the license plates, for the present the motto is needed to distinguish plaintiffs' automobile from automobiles that have no motto on their plates but have the same identification number. However, the state defendants have not shown that any New Hampshire non-passenger motor vehicles have the same identification number as plaintiffs' and there is evidence in the record suggesting that none do. So, even assuming *arguendo* that this would be a sufficient justification, defendants have not satisfied their burden.

14. The fact that defendants have not satisfied the *O'Brien* test is not necessarily dispositive of the statute's invalidity. *See Spence* v. *Washington*, *supra* at 414 n. 8; Ely, *supra* at 1496-97. It is implicit in the foregoing discussion, however, that neither of the interests New Hamsphire has identified is sufficiently weighty to justify the interference with plaintiffs' protected expression.

Defendants also argue that the New Hampshire defacement statute effects such minimal interference with the values protected by the First Amendment that the state's otherwise insufficient justifications should be deemed sufficient for this case. The core of defendants' submission is that plaintiffs have equally effective alternative means of conveying their message: they could place bumper stickers near the plates which express their disagreement with the motto. We reject this argument. *Spence* v. *Washington*, *supra*, summarily rejected the contention that the free expression claim should fail since it was "miniscule and trifling" in view of the thousands of other available means of disseminating the views. One may not have his liberty of expression in an appropriate place abridged on the ground that the message could be conveyed in an alternative way. 418 U.S. at 411 n. 4. *See Cohen* v. *California*, 403 U.S. 15 (1971); *Schneider* v. *State*, 308 U.S. 147, 163 (1939).

their First Amendment rights, and we would be ill-advised to interfere further with the operation of New Hampshire's system of vehicle identification.

So ordered.

s/Frank M. Coffin
U.S. Circuit Judge

s/Edward T. Gignoux
U.S. District Judge

s/Hugh H. Bownes
U.S. District Judge

Dated at Concord, New Hampshire
on February 9, 1976

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

Judgment
filed February 9, 1976

This action came on for (hearing) before the Court, Honorable Frank M. Coffin, Honorable Edward T. Gignoux, and Honorable Hugh H. Bownes, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

This action came on for (hearing) before the Court Honorable Frank M. Coffin, Honorable Edward T. Gignoux, and Honorable Hugh H. Bownes, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged judgment in accordance with OPINION entered February 9, 1976.

s/William H. Barry, Jr.
Clerk of Court

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed February 17, 1976

Notice is hereby given that Neal R. Wooley, Paul A. Doyon, and Frederick Clarke, Jr., the Defendants above-named, hereby appeal to the Supreme Court of the United States from the final order granting declaratory and injunctive relief entered in this action on February 9, 1976.

This appeal is taken pursuant to 28 U.S.C. §1253.

s/Robert V. Johnson, II
The State of New Hampshire
Office of the Attorney General
Robert V. Johnson, II
Assistant Attorney General
Counsel for the Defendants

(Certificate of Service omitted in printing)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1453

Neal R. Wooley, individually
and as Chief of Police, Lebanon,
New Hampshire; Paul A. Doyon,
individually and as Director of
the New Hampshire State Police;
Frederick Clarke, Jr., individually
and as Commissioner of the
New Hampshire Department of Motor Vehicles, Appellants

v.

George Maynard and
Maxine Maynard, Appellees

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The appellees, George Maynard and Maxine Maynard, ask leave to file the attached Motion to Affirm without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The appellees' affidavits in support of this Motion are attached hereto.

Respectfully submitted,

Richard S. Kohn, Esquire,
Jack B. Middleton, Esquire,
R. David DePuy, Esquire, and
McLane, Graf, Greene,
Raulerson & Middleton,
Professional Association

By R. David DePuy
Counsel for the Appellees

May 11, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1453

Neal R. Wooley, individually
and as Chief of Police, Lebanon
New Hampshire; Paul A. Doyon,
individually and as Director of
the New Hampshire State Police;
Frederick Clark, Jr., individually
and as Commissioner of the
New Hampshire Department of Motor Vehicles, Appellants

v.

George Maynard and
Maxine Maynard, Appellees

A F F I D A V I T

I, George Maynard, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am one of the appellees in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said cause.

5. The nature of said cause is briefly stated as follows:

My wife, Maxine Maynard and I sought declaratory and injunctive relief in the United States District Court for the District of New Hampshire pursuant to 42 U.S.C. §1983 requesting that NHRSA 263:1, which requires all New Hampshire noncommercial vehicles to bear number plates with the state motto, "Live Free or Die," written thereon, be declared unconstitutional on its face

and as applied to us, and that NHRSA 262:27-C be declared to be violative of the First and Fourteenth Amendments by making it a crime to obscure the state motto. By way of injunctive relief, we requested that the Court restrain the appellants from arresting or prosecuting us in the future for masking the state motto. A three judge federal court was convened and ruled that NH RSA 262:27-C was unconstitutional as applied to us in that it abridged our rights protected by the First and Fourteenth Amendments. The court enjoined the appellants from arresting either of us "at any time in the future for covering over that portion of [our] license plates that contains the motto 'Live Free or Die.'"

George Maynard

Duly witnessed and sworn to before me, a Notary Public this day of , 1976.

Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1453

Neal R. Wooley, individually and as Chief of Police, Lebanon New Hampshire; Paul A. Doyon, individually and as Director of the New Hampshire State Police; Frederick Clark, Jr., individually and as Commissioner of the New Hampshire Department of Motor Vehicles, Appellants

v.

George Maynard and Maxine Maynard, Appellees

A F F I D A V I T

I, Maxine Maynard, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am one of the appellees in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

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My husband, George Maynard and I sought declaratory and injunctive relief in the United States District Court for the District of New Hampshire pursuant to 42 U.S.C. §1983 requesting that NHRSA 263:1, which requires all New Hampshire noncommercial vehicles to bear number plates with the state motto, "Live Free or Die," written thereon, be declared unconstitutional on its face

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Maxine Maynard

Duly witnessed and sworn to before me, a Notary Public this day of , 1976.

Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 753-1453

NEAL R. WOOLEY, individually and as Chief of Police, Lebanon, New Hampshire; PAUL A. DOYON, individually and as Director of the New Hampshire State Police; FREDERICK N. CLARKE, JR., individually and as Commissioner of the New Hampshire Department of Motor Vehicles,
APPELLANTS

v.

GEORGE MAYNARD and MAXINE MAYNARD,
APPELLEES

CERTIFICATE OF SERVICE

I, R. David DePuy, Esquire, depose and say that on May 11, 1976, copies of the "Motion For Leave to Proceed In Forma Pauperis" and accompanying unexecuted Affidavits of George Maynard and Maxine Maynard were mailed, postage prepaid to Robert V. Johnson, II, counsel for Appellants, State House Annex, Room 208, Concord, New Hampshire 03301, and Richard S. Kohn, Esquire, Suite 526, 733 15th St., N.W., Washington, D. C. 20005, co-counsel for the Appellees.

R. David DePuy

STATE OF NEW HAMPSHIRE
COUNTY OF HILLSBOROUGH

Subscribed and sworn to before me at Manchester this 11th day of May, 1976.

Robert A. Wells
Justice of the Peace

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1453

NEAL R. WOOLEY, individually and as
Chief of Police, Lebanon, New Hampshire;
PAUL A. DOYON, individually and as
Director of the New Hampshire State Police;
FREDERICK N. CLARKE, JR., individually
and as Commissioner of the New Hampshire
Department of Motor Vehicles,
APPELLANTS

v.

GEORGE MAYNARD and MAXINE MAYNARD,
APPELLEES

CERTIFICATE OF SERVICE

I, R. David DePuy, Esquire, depose and say that on May 11, 1976, copies of the "Motion to Affirm On Behalf Of Appellees George Maynard and Maxine Maynard" were mailed, postage prepaid, to Robert V. Johnson, II, counsel for the Appellants, State House Annex, Room 208, Concord, New Hampshire 03301, and Richard S. Kohn, Esquire, Suite 526, 733 15th Street, N.W., Washington, D. C. 20005, co-counsel for the Appellees.

R. David DePuy

STATE OF NEW HAMPSHIRE
COUNTY OF HILLSBOROUGH

Subscribed and sworn to before
me at Manchester this 11th day
of May, 1976.

Robert A. Wells
Justice of the Peace

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October Term, 1975

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APPELLANTS

v.

GEORGE MAYNARD and MAXINE MAYNARD,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

MOTION TO AFFIRM ON BEHALF OF APPELLEES GEORGE MAYNARD and MAXINE MAYNARD

Richard S. Kohn, Esq.,

Jack B. Middleton, Esq.,

R. David DePuy, Esq., and

McLane,Graf,Greene,
Raulerson & Middleton,
Professional Association

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1453

NEAL R. WOOLEY, individually and as Chief of Police, Lebanon, New Hampshire; PAUL A. DOYON, individually and as Director of the New Hampshire State Police; FREDERICK N. CLARKE, JR., individually and as Commissioner of the New Hampshire Department of Motor Vehicles,
APPELLANTS

v.

GEORGE MAYNARD and MAXINE MAYNARD,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

MOTION TO AFFIRM ON BEHALF OF APPELLEES GEORGE MAYNARD and MAXINE MAYNARD

The appellees, George and Maxine Maynard, pursuant to Rule 16 of this Court's Rules, hereby move that the Judgment below be affirmed on the grounds that the questions on which the decision of the cause depends are so insubstantial as not to need further argument and that the decision below is plainly correct.

OPINION BELOW

The opinion of the United States District Court for the District of New Hampshire was rendered on February 9, 1976 and is reported at 406 F. Supp. 1381. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

The appellants have properly invoked the jurisdiction of this Court under 28 U.S.C. Sec. 1253, this being an appeal from an order granting, after notice and hearing, a permanent injunction in a civil action required to be heard and determined by a District Court of three judges.[1/]

QUESTIONS PRESENTED

I. Whether the doctrine of equitable restraint has any application to the action commenced by George Maynard where, at the time it was filed, there was no pending state prosecution, the relief sought was prospective only, and where no attempt was made to attack collaterally his state court convictions?

II. Whether the doctrine of equitable restraint has any application to the action commenced by Maxine Maynard, against whom no state court prosecutions had been brought but who was threatened with prosecution if she drove her car with the state motto taped over?

III. Whether the appellees can be criminally prosecuted for taping over the motto "Live Free or Die" on their license plates with reflective red tape to express their religiously based opposition to that sentiment?

STATUTES INVOLVED

This case involves the First and Fourteenth Amendments to the Constitution of the United States, NHRSA 262:27-c and NHRSA 263:1, all of which are set forth in Appendix B.

STATEMENT

The appellees, George and Maxine Maynard, are Jehovah's Witnesses. At the time this suit was commenced, they owned two

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1/ It is clear that the appeal lies to this Court and not to the Court of Appeals where plaintiffs' complaint attacked the constitutionality of NHRSA 262:27-c "on its face and as applied" rather than the result obtained by the application of the statute. Turner v. Fouche, 396 U.S. 346, 353 n. 10 (1970).

automobiles. Since 1969, the State of New Hampshire has required that all number plates for non-commercial vehicles, with some exceptions, shall bear the State motto, "Live Free or Die." NHRSA 263:1. Under New Hampshire law, it is a misdemeanor knowingly to obscure the figures or letters on the license plates. NHRSA 262:27-c.[2/] Appellees believe that the message conveyed by the State motto is repugnant to their religious and political beliefs and refuse to display it on their automobiles.

Beginning in March or April, 1974, the appellees began covering the words "Live Free or Die" on their license plates with bright orange or red reflective tape. As a result, appellee George Maynard has three times been arrested, prosecuted and convicted for violating NHRSA 262:27-c. He has spent fifteen days in the House of Correction for his refusal to pay fines arising out of these convictions. As described by the district court in its opinion:

> "His first arrest took place on November 27, 1974. He appeared in Lebanon District Court pro se on December 6, 1974 at which time he explained that he had religious objections to displaying the motto on his license plate. The court found him guilty and fined him $25, but suspended the fine during good behavior. On December 28, 1974, Mr. Maynard was issued his second summons; and on January 31, 1975, he again appeared in court pro se. He was found guilty, fined $50, and sentenced to the Grafton County House of Corrections for six months. The court suspended the prison sentence. After trial, Maynard advised the court that he would have to refuse to pay the fines, which totalled $75, as a matter of religious conscience. The court then ordered him committed to the House of Corrections for a period of fifteen days. Prior to his incarceration, Mr. Maynard had on January 3, 1975 received his third summons for violating the statute. He was also found guilty by the court

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2/ The New Hampshire Supreme Court has held that "letters" includes the words of the State motto. State v. Hoskin, 112 N.H. 332, 295 A. 2d 454 (1972).

> of this offense on January 31, 1975, but sentencing was continued. At oral argument, counsel for the state defendants informed [the court] that, in this context, continued for sentencing is a final sentence under New Hampshire law. No collateral consequences will attach as a result of it unless Mr. Maynard is arrested and prosecuted for the violation of NHRSA 262:27-c at some time in the future." [3/] Maynard v. Wooley, 406 F. Supp. at 1384.

The present action was instituted by the appellees on March 4, 1975 to obtain a federal declaratory judgment that NHRSA 263:1 was unconstitutional on its face and as applied to them insofar as it required them to display the state motto on their license plates and that NHRSA 262:27-c violated the First and Fourteenth Amendments by making it a crime to obscure the state motto. Further, they sought injunctive relief, to operate in futuro, to prevent the appellants from arresting or prosecuting them for masking the state motto on their plates. They did not seek to have Mr. Maynard's prior convictions vacated or his arrest records expunged.

On March 11, 1975, the District Court issued a Temporary Restraining Order enjoining the appellants from making further arrests of the appellees pending a decision on the merits. An evidentiary hearing was held on September 22, 1975. On February 9, 1976, the court entered its opinion and order declaring NHRSA 262:27-c unconstitutional as applied to the appellees. The court granted a permanent injunction against the defendants preventing them from arresting or prosecuting the appellees for expressing their dissent from the state motto by taping it over.

3/ The court noted in a footnote that the time to appeal Mr. Maynard's prior convictions had expired before this action was brought. 406 F. Supp. 1384 n. 4 (1976).

ARGUMENT [4/]

THE OPINION OF THE THREE-JUDGE FEDERAL COURT WHICH IS THE SUBJECT OF THIS APPEAL IS OBVIOUSLY CORRECT SO AS TO WARRANT NO FURTHER REVIEW.

I. The doctrine of equitable restraint does not act as a bar to appellees' federal court action for declaratory and injunctive relief because it does not interfere in any way with the state criminal process and does not violate principles of comity, equity or federalism.

The policy of equitable restraint is rooted in the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if equitable relief is denied. Younger v. Harris, 401 U.S. 37, 43-44 (1971). The underlying premise is that ordinarily, a pending state prosecution "provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." Kugler v. Helfant, 421 U.S. 117, 124 (1975). These principles have no application here because appellees sought no relief against any ongoing state prosecution; in fact, there were no state prosecutions pending at the time appellees filed this suit. The sole purpose of the appellees' federal action was to obtain declaratory and injunctive relief to protect them from future arrests and prosecutions. The appellants conceded at the oral argument that more prosecutions would be forthcoming if the appellees persisted in their activity of taping over the state motto on their license plates. (Tr. p. 9) Under the circumstances, relief in the

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4/ Since the decision of the District Court can be sustained solely on the basis of reasons stated in its opinion, appellees in this motion do not brief additional grounds for the decision.

federal courts is appropriate. Steffel v. Thompson, 415 U.S. 452 (1974); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

Appellants rely on Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and Kugler v. Helfant, 421 U.S. 117 (1975), for the proposition that appellees' failure to exhaust state appellate remedies precludes federal intervention. Those cases are easily distinguished. In Huffman v. Pursue, Ltd., supra, the federal plaintiff, acting on advice of counsel, made a deliberate decision to forego its state appellate remedies and seek injunctive relief in the federal courts against the state court judgment. If this maneuver had been permitted, the effect would have been to substitute the federal courts for the state appellate system. That is not the case here.

In each of his appearances in court, Mr. Maynard was not represented by an attorney and advised the court that he wished to represent himself. (Tr. 31, 44-45). After his first conviction on December 6, 1975, the fine imposed by the court was suspended during "good behavior." There was, therefore, no reason for an appeal. On January 31, 1975 when Mr. Maynard was convicted for his second and third offenses, he advised the court that he would not pay the accumulated fines as a matter of Christian conscience. The judge then sentenced him to fifteen days in jail. He served his sentence and was released on February 15, 1975. This record negates a calculated decision to forego appeal in the state courts and substitute the federal courts for the state appellate system. When appellees filed their action on March 4, 1975 not only were there no prosecutions pending

against Mr. Maynard but also the time for appealing his prior state convictions had expired. 5/

Kugler v. Helfant, supra, is similarly inapposite because there the federal plaintiff was the subject of state criminal proceedings and was trying to bring himself within the "extraordinary circumstances" exception to the Younger rule. While the appellees here have argued in the alternative that they fall within that exception, Kugler is not authority that would support appellants' exhaustion theory where there is no pending state prosecution. 6/

The appellants also rely on Cardillo v. Zyla, 486 F. 2d 473 (1st Cir. 1973) for the proposition that Mr. Maynard's federal action is an attempt to attack collaterally his state court convictions. As pointed out above, the federal action sought prospective relief only and would have no impact whatever on Mr. Maynard's prior convictions.

5/ Under New Hampshire's two-tier system of review, a defendant in a criminal case may appeal to the Superior Court for trial de novo at the time of sentencing in the District Court. RSA 599:1. If a defendant fails to take an appeal at that time, he may petition for an appeal within three days of the date sentence is declared. RSA 599:1-a. A person prevented from taking an appeal "through mistake, accident or misfortune and not from his own neglect" has 30 days after sentence is declared to petition the Superior Court for permission to appeal. RSA 599:1-b.

6/ Huffman, supra and Kugler, supra, would only be germane if, after being sentenced to the House of Correction on January 31, 1975, Maynard had filed a suit in federal court to enjoin the state court proceedings or execution of sentence.

II. The doctrine of equitable restraint has no application to the action brought by Maxine Maynard, against whom no state court proceedings had been brought but who was under a threat of prosecution.

In any event, it is clear that Mr. Maynard's failure to appeal from his criminal convictions could not act to bar Mrs. Maynard from obtaining a declaratory judgment and injunctive relief from the threat of prosecution. Despite some initial quibbling, the state, at oral argument, stipulated that both appellees were under the threat of prosecution. 7/ It was stipulated that Mrs. Maynard would testify that she shared her husband's religious beliefs and that she permitted to be obscured the words on the license plates on the car of which she is a co-owner. (Tr. 50-52) This is not a situation where "legally distinct parties are so closely related that they should all be subject to the Younger considerations which govern any of them." Doran v. Salem Inn, Inc., 422 U.S. 922, 928 (1975). Mr. and Mrs. Maynard are individuals. If Mrs. Maynard were prosecuted and convicted of misuse of plates, she would go to jail in her own

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7/ Tr. pp. 8-9:

Mr. Johnson: The state will not stipulate there is any threat of prosecution to Mrs. Maynard, nor to Mr. Maynard, so long as he complies with the laws of this state.

Judge Gignoux: Will the State stipulate if they do not comply with the State there is a threat of prosecution?

Mr. Johnson: Yes, your honor.

Judge Gignoux: And, specifically, they do not comply with the statute here in question, which makes it unlawful, as I understand it, to obliterate "Live Free or Die" on those plates.

Mr. Johnson: Yes, your honor.

Judge Gignoux: There is a threat of prosecution of both.

Mr. Johnson: Yes, your honor.

Judge Coffin: All right, you may proceed.

See also Tr. pp. 51-52.

right. She cannot be precluded from obtaining a declaration as to the constitutionality of the statutes in question since she was clearly in jeopardy of being arrested for the same offense of which her husband had three times been convicted. Cf. Steffel v. Thompson, supra.

III. Appellees may not be criminally prosecuted for their act of taping over the words "Live Free or Die" on their license plates as an expression of their conscientious objection to the message conveyed thereby.

In determining whether the appellees' act in taping over the state motto on their license plates was symbolic speech, the District Court applied the principles set forth in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) and Spence v. Washington, 418 U.S. 405 (1974). This Court has said that conduct is a form of expression entitled to constitutional protection when it is "sufficiently imbued with elements of communication" so as to convey a "particularized message." Spence, 418 U.S. at 409, 411.

The court below found that these elements were satisfied by the fact that (1) in using red reflective tape to cover the motto the appellees clearly intended to call attention to the fact that they deliberately obscured it because they disagreed with it, and (2) appellees' message was likely to be readily understood by other New Hampshire citizens. The court then applied the four part test set forth in United States v. O'Brien, 391 U.S. 367 (1968) to determine whether the state's interest in displaying the motto on non-commercial license plates was sufficient to

restrict appellees' freedom of expression. The court found that the government regulation failed the third and fourth requirements set out in O'Brien in that the regulation was directly related to the suppression of free expression and that the motto was not required for purposes of identification, noting that other means were available to the state to preserve its interest in facilitating vehicle identification. Clearly, any state interests of pride and individualism are not denied by allowing appellees their right to free expression. If anything, they are furthered. As noted by the District Court, the state's claim that the motto "Live Free or Die" is needed to facilitate identification is belied by the fact that only passenger car license plates contain the motto. 406 F. Supp. 1388. Furthermore, the New Hampshire Director of Motor Vehicles testified that the taping of the motto on a license plate such as appellees' presents no identification problem. (Tr. 63)

Of 39 different types of New Hampshire plates, the motto "Live Free or Die" appears on only one type, the passenger car type. (Tr. 57-58) For a fee of five dollars a person may order a personalized license plate containing any combination letters and numbers not exceeding five, if not already assigned to someone else. (Tr. 67) Presumably the state could produce plates without the motto thereon for a five dollar fee within ten days. (Tr. 67)

In their Jurisdictional Statement, the appellants argue that Tinker and Spence are inapposite because the conduct engaged in there derived its communicative quality from the "then emotional Vietnam conflict." (J.S. p. 16) They stress

that in the case at bar, appellees' conduct is directed at an object having symbolic significance far less than that of the flag. They assert that the meaning of "Live Free or Die" is ambiguous and that a fortiori no "particularlized message" could be conveyed by covering it. Further, they suggest that the meaning of a symbolic act must be apparent at the time it is made and that the intended meaning cannot be explained by the testimony of the actor at his trial. (J.S. p. 18)

While the existence of a war may be significant in providing a backdrop for an act of symbolic speech, it goes primarily to the question of whether the message is likely to be understood, and not to whether the actor intended to convey a message. Here, where the state has required many of its citizens to display a politically loaded slogan on their private property, there can be no doubt that the act of covering that slogan over with bright red tape is designed to convey opposition to it. As George Maynard testified, the bright fluorescent red tape was effective in bringing attention to what they were doing. (Tr. pp. 16-17) Appellants contend that the phrase "Live Free or Die" is ambiguous and therefore no particularlized message could be conveyed by covering it. Yet the dominant message conveyed is that political freedom is the greatest good and that it is better to die than to live under tyrannical rule. Covering over this motto when it is required to be displayed is a clear statement that one disagrees with it. Appellants' suggestion that a symbolic act cannot be explained by testimony at trial is startling. Spence and Tinker directly contradict this.

Finally, the appellants are in error when they suggest that it is significant that appellees' conduct is directed at an object having less symbolic significance than the flag. It should be sufficient answer that Mary Beth Tinker's black armband had no intrinsic significance except as a symbol of mourning. Arguably, this has less symbolic significance than covering over an explicitly stated message that one must "Live Free or Die."

There is no doubt that in taping over the motto, the appellees intended to make a statement of their strong opposition to the credo, "Live Free or Die." It is equally clear that this message would be understood by other New Hampshire citizens seeing the appellees' license plates. Testimony at trial supported this. (Tr. pp. 16-17)

Unlike the situation in Spence v. Washington, supra, where Harold Spence was under no obligation to display the American flag, NHRSA 262:27-c compels the appellees to display a slogan they conscientiously oppose in order to operate their automobile on public highways.[8/] The only relief the appellees seek is the right to believe what they wish and to express those beliefs to others. To exercise

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8/ Thus it may be argued that to criminally prosecute the Maynards for taping over a slogan they find repugnant amounts to conditioning access to public highways upon the advertising of a prescribed sentiment which a state may not do, just as it may not condition attendance at school upon the saluting of the flag and reciting of the pledge of allegiance. Board of Education v. Barnette, 319 U.S. 624 (1943). The decision below indicates that Judge Bownes would find NHRSA 262:27-c violative of the appellees' right to be free from "compelled affirmations of belief." 406 F. Supp. at 1386 n. 9.

their rights and express their beliefs they must tape over the motto.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the judgment and order of the District Court should be affirmed.

Respectfully submitted,

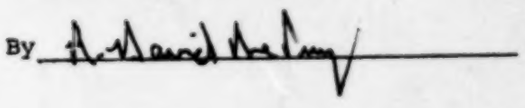
Richard S. Kohn, Esq.

Jack B. Middleton, Esq.

R. David DePuy, Esq., and

McLane, Graf, Greene,
Raulerson & Middleton,
Professional Association

Counsel for the Appellees,
George Maynard and
Maxine Maynard

By 

May 11, 1976

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

GEORGE MAYNARD and
MAXINE MAYNARD,

Plaintiffs,

v. Civil Action No. 75-57

NEAL R. WOOLEY, individually
and as Chief of Police,
Lebanon, New Hampshire,
et al.,

O P I N I O N

COFFIN, Chief Judge. This is an action instituted pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief against the enforcement of NHRSA 262:27-c, which makes it a crime to obscure the words "Live Free or Die" on New Hampshire state license plates. Plaintiffs, George and Maxine Maynard -- both Jehovah's Witnesses -- state that they have political and religious objections to operating a motor vehicle which displays this motto, and they contend that the enforcement of the New Hampshire statute against them is contrary to the First and Fourteenth Amendments of the United States Constitution. George Maynard has, on three occasions in the past, been arrested, prosecuted, and convicted for violating the statute in question. The plaintiffs seek a declaratory judgment that, as applied to them,

NHRSA 262-27-c is contrary to the United States Constitution, an injunction against any future arrests and prosecutions, and an injunction requiring that, in future years, they be issued plates that do not contain the motto "Live Free or Die". The single district judge granted plaintiffs' prayer for a temporary restraining order enjoining future arrests and prosecutions. Because the action seeks an injunction against the enforcement of a state statute on the grounds of its unconstitutionality, a three-judge court was convened pursuant to 28 U.S.C. § 2281.

Since 1969, NHRSA 263:1 has required that all number plates for non-commercial vehicles, with some exceptions, shall have the state motto "Live Free or Die" embossed on them.[1] NHRSA 262:27-c (Supp. 1973), makes it a misdemeanor knowingly to obscure the figures or letters on the license plates, and under New Hampshire law, the "letters" include the state motto. State v. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972).[2]

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1. The New Hampshire state motto, which is reminiscent of the words of Patrick Henry -- "[B]ut as for me, give me liberty or give me death." -- derives from the words of Major General John Stark, reputed to have been written in 1809 as part of a toast in a letter to former comrades-at-arms: "Live free or die; death is not the worst of evils." Moore, A Life of General John Stark of New Hampshire 500 (1949). New Hamphire adopted "Live Free or Die" as its state motto in 1945, and in 1969, it passed a law requiring that, as of 1971, the motto must appear on most non-commercial plates.

2. In Hoskin, the New Hampshire Supreme Court held that NHRSA 262-27-c is not repugnant to either the due process clause or the First Amendment of the federal Constitution. In Hoskin, unlike the case at bar, the appellants did not contend that the act of covering the motto constituted symbolic speech that is protected by the First Amendment. Their First Amendment argument, which the New Hampshire Supreme Court rejected, was that the statute in question penalized them for exercising the right, recognized in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), to be free from a required affirmation of belief.

The plaintiffs own two automobiles. Beginning in March or April, 1974, they began covering the "Live Free or Die" on their license plates with tape -- usually reflective red tape. Beginning in late 1974 Mr. Maynard was arrested three times for violating NHRSA 262-27-c. His first arrest took place on November 27, 1974. He appeared in Lebanon District Court pro se on December 6, 1974 at which time he explained that had religious objections to displaying the motto on his license plate.[3] The court found him guilty and fined him $25, but suspended the fine during "good behavior". On December 28, 1974, Mr. Maynard was issued his second summons; and on January 31, 1975, he again appeared in court pro se. He was found guilty, fined $50, and sentenced to the Grafton County House of Corrections for six months. The court suspended the prison sentence. After trial, Maynard advised the court that he would have to refuse to pay the fines, which totalled $75, as a matter of religious conscience. The court then ordered him committed to the House of Corrections for a period of fifteen days. Prior to his incarceration, Mr. Maynard had on January 3, 1975 received his third summons for violating the statute. He was also found guilty by the court of this offense on January 31, 1975, but sentencing was continued. At oral argument, counsel for the state defendants informed us that, in this context, "continued for sentencing" is a final sentence under New Hampshire law. No collateral consequences will

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3. Mr. Maynard states that his religious objection to displaying the state motto is that "[b]y religious training and belief, [he] believe[s] that [his] government--'Jehovah's Kingdom'--offers everlasting life. It would be contrary to that belief to give up [his] life for the state, even if it meant living in bondage." He refuses to be coerced by the state to advertise a slogan which he finds morally, ethically, religiously, and politically abhorrent. Maxine Maynard testified that she shares her husband's views.

attach as a result of it unless Mr. Maynard is arrested and prosecuted for the violation of NHRSA 262:27-c at some time in the future.[4]

I. The Applicability of the Doctrine of Equitable Restraint

The state defendants contend that we are precluded from considering the constitutional merits of plaintiffs' claim by the doctrine of equitable restraint of Younger v. Harris, 401 U.S. 37 (1971). We disagree. Younger held that, in all but the most exceptional circumstances, a federal court should refuse to enjoin an ongoing criminal prosecution. Here, however, plaintiffs do not seek to enjoin a pending criminal prosecution. Their primary objective is to obtain declaratory and injunctive relief against future arrests and prosecutions. It is well established that where a federal plaintiff desires protection against threatened state prosecution of a constitutionally protected course of conduct in which he proposes to engage, a federal court can grant equitable relief. Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (preliminary injunction); Steffel v. Thompson, 415 U.S. 452 (1974) (declaratory judgment). We believe that where, as here, the federal plaintiffs assert that enforcement of state laws against them would violate their First and Fourteenth Amendment rights and where, as here, state officials fully intend to enforce those laws, it is entirely appropriate that this court entertain plaintiffs' claim for injunctive relief.[5]

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4. The time for appeal from Mr. Maynard's convictions had expired before plaintiffs filed the present action on March 4, 1975.

5. The court finds, as the state defendants concede, that both plaintiffs are under a sufficient threat of prosection to present a justiciable controversy. See Steffel v. Thompson, supra at 459; Younger v. Harris, supra at 42.

Defendants do not dispute that the Younger doctrine permits federal injunctive relief against threatened arrests and prosecutions. Rather, they contend that Mr. Maynard is barred by his failure to appeal any of his three state convictions. For this proposition, they rely upon Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). There, the Court held that the federal plaintiff was barred because it had chosen not to avail itself of its state appellate remedies, but, instead, had instituted suit in the federal court to obtain relief from a state court judgment. See also Ellis v. Dyson, 421 U.S. 426, 439-43 (1975) (Powell, J., dissenting). Huffman, however, is readily distinguishable. Huffman, like Younger, was a case in which granting the requested injunctive relief would have interfered with the processes of the state court by nullifying prior or pending state court proceedings. Here, no such interference can result. Plaintiffs are not collaterally attacking Mr. Maynard's state court convictions.[6] The relief they seek is purely prospective. Therefore, neither Younger nor Huffman requires that we stay our hand; indeed, since plaintiffs have demonstrated that they will suffer irreparable harm if we do not intervene and have stated a substantial constitutional claim, it is our responsibility to hear the case. Cf. Zwickler v. Koota, 389 U.S. 241, 247-48 (1967).

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6. A more plausible position for defendants to take would be that Mr. Maynard's state convictions bar litigation of the federal constitutional issues. Although more plausible, this argument too fails. The first circuit has held that a state criminal conviction will have a preclusive effect in a federal civil rights action only with respect to matters actually litigated and decided at the state criminal trial. Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909 (1975). Since the constitutionality of the state statutes was not litigated by Mr. Maynard in the state misdeameanor proceedings, collateral estoppel principles do not preclude this court from considering this issue.

Even if the doctrine of equitable restraint barred Mr. Maynard's suit, we would still have to consider whether it bars Mrs. Maynard's action. She has an ownership interest in the Maynard family cars and, accordingly, is under a separate threat of prosecution. Cf. Steffel v. Thompson, supra at 459. This is not a situation "in which legally distinct parties are so closely related that they should all be subject to the Younger considerations which govern any of them", Doran v. Salem Inn, Inc., supra at 928. Doran suggested that such a situation might be presented where plaintiffs are brother-sister corporations related "in terms of ownership, control and management". Id. Here, however, each of the Maynards is acting on his or her own independently held religious precepts. There is no suggestion that either controls the actions or beliefs of the other. The relationship between these plaintiffs is thus much closer to that presented in Steffel v. Thompson, supra.[7] In our view, therefore, Mr. Maynard's failure to appeal his state convictions could not bar Mrs. Maynard's federal action for protection from future state criminal prosecution.

II. The Constitutional Merits

Plaintiffs' principal contention is that the New Hampshire statutes cannot be enforced against them consistent with the First Amendment of the federal Constitution, which, of course, is applicable to the states.[8] They maintain that their act of masking over the words "Live Free or Die" is constitutionally immune from state regulation because this act was done to avoid a required affirmation of belief, under the rule of West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); and because their act constituted symbolic speech, as to which New Hampshire cannot demonstrate a sufficient interest to regulate. See Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). Since we accept plaintiffs' contention that their acts constituted constitutionally protected symbolic speech and that the state cannot prosecute them for masking the motto, we need not consider whether their First Amendment right to be free from a required affirmation of belief is implicated.[9]

We begin by identifying the public and private interests that are at stake. Although the act of covering the motto on a license plate may, in some cases, be an act of pure

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7. In Steffel, two persons engaging in antiwar handbilling outside a shopping center were threatened with state prosecution. One stopped, but the other continued and was arrested and charged with criminal trespass. While this state prosecution was pending, both filed a civil rights action in federal court seeking declaratory relief. The court held that while the one who had been arrested was barred by the Younger doctrine, the other remained free to present his federal claim. See Doran v. Salem Inn, Inc., supra at 928.

8. Plaintiffs also rely upon the due process and equal protection clauses of the Fourteenth Amendment. Because plaintiffs' First Amendment claim is dispositive, we do not address these alternate claims.

9. Judge Bownes would also rest our decision on the ground that NHRSA 262:27-c violates plaintiffs' right to be free from "compelled affirmations of belief".

whimsy, it is clear that plaintiffs' act of masking the motto with reflective red tape is motivated by deeply held, fundamentalist religious beliefs that death is an unreality for a follower of Christ and, to a lesser extent, that it is wrong to give up one's earthly life for the state, even if the alternative is living in bondage. Plaintiffs' act of covering the "Live Free or Die" accomplishes two closely interrelated objectives: it relieves them of the burden of displaying a message which offends their beliefs, and, at the same time and more importantly, it communicates their strong disagreement with implications of the message. We have no doubt that plaintiffs' interest implicates the First Amendment. Whatever else may be said about the motto "Live Free of Die", it expresses philosphical and political ideas. Plaintiffs' desire not to be aligned with these ideas falls within the ambit of the First Amendment.[10]

The state interests promoted by the requirement that New Hampshire passenger cars display license plates bearing this motto are essentially twofold. First, the state believes that the dissemination of the motto and the association of it with New Hampshire serves a number of

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10. The defendants contend that the significance of "Live Free or Die" is primarily historical and that the motto is, in any event, so ambiguous that any First Amendment interest plaintiffs assert is de minimis. We do not deny the historical significance of New Hampshire's motto, but this significance is necessarily related to the philosophical and political ideas that have been so important in American history, see note 1 supra, but which plaintiffs are not compelled to endorse. Although the vast majority of, if not all other, state mottoes seem to lack ideological content, "Live Free or Die" has obvious political and philosophical significance for many. The New Hampshire motto may not be as politically charged as other slogans that might be placed on license plates, e.g., "Amnesty Now", but we can conceive of no neutral principle which would permit us to distinguish "Live Free or Die" from such others.

values: fostering appreciation of state history and tradition; creating state pride, identity, and individualism; and promoting tourism. Second, the presence of the motto on the plates aids in the identification of New Hampshire passenger cars. To permit individuals to mask the "Live Free or Die" on their plates would frustrate the attainment of these objectives. Whether these state interests are sufficient to justify the restriction on plaintiffs' activity will be considered below.

Plaintiffs' contention is that their act of masking the "Live Free or Die" on their license plates constitutes symbolic speech and that the New Hampshire defacement statute, NHRSA 262:27-c, is invalid as applied to them because it is not supported by any state interests that are sufficiently important to justify the restriction of protected expression. We agree.

This claim is based principally on two recent opinions of the United States Supreme Court invalidating state limitations on the exercise of "symbolic speech". In Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court held it a violation of the First and Fourteenth Amendments for public school officials to discipline students for wearing black armbands to school in protest of United States involvement in Vietnam. In Spence v. Washington, 418 U.S. 405 (1974) (per curiam), the Court overturned appellant's conviction for "improper use" of an American flag where, in May, 1970, shortly after the invasion of Cambodia and the shootings at Kent State University, appellant had taped a peace symbol onto an American flag and hung it upside down from his window. See Cline v. Rockingham County Superior Court, 502 F.2d 789 (1st Cir. 1974). In each case, the Court concluded that the claimant's act was sufficiently imbued

with the elements of communication to be within the ambit of the First Amendment and that the state interests relied upon were insufficient to justify the restrictions on the protected expressions.

We are satisfied that plaintiffs' acts of covering the motto "Live Free or Die" constitutes symbolic speech within the meaning of Tinker and Spence. The use of reflective red tape to mask the motto is clearly intended to call attention to the fact that the motto has been obscured and thereby to communicate plaintiffs' disagreement with it. The context of plaintiffs' actions, which is important in determining their communicative quality, see Spence v. Washington, supra at 410, is such that plaintiffs' message is likely to be readily understood. New Hampshire citizens are well aware that the motto "Live Free or Die" appears on the license plates of passenger cars registered in that state, and the likelihood is great that they will interpret plaintiffs' obliteration of the motto as an expression of their conscientious objections to its implications.[11] Since plaintiffs' actions are intended as expression and readily perceived as such, we conclude that they are seeking to enjoin "a

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11. There is, moreover, evidence in the record that, at least since the decision of the New Hampshire Supreme Court in State v. Hoskin, supra, handed down in 1972, New Hampshire citizens have been generally aware that individuals like the plaintiffs have been covering the "Live Free or Die" on their license plates in order to express their opposition to the motto's implication that political freedom is the greatest good. This consideration supports our conclusion that the likelihood is great that observers will understand the significance of plaintiffs' acts.

prosecution for the expression of an idea through activity." Spence v. Washington, supra at 411.[12]

Having found symbolic speech, we now consider the sufficiency of New Hampshire's justifications for the statute. In United States v. O'Brien, 391 U.S. 367 (1968), upholding the respondent's conviction for knowing destruction of his draft card, the Supreme Court developed a four-part test for determining whether a government regulation restricting the freedom of expression protected by the First Amendment is justified. The Court stated, id. at 377:

> "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

We find that the defacement statute fails to meet two of the four components of the O'Brien test. The state has asserted that the statute serves two purposes: facilitating vehicle identification and promoting appreciation of history, state pride, individualism, and tourism. The effectuation of these objectives is within the constitutional power of the state and furthers

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12. Defendants contend that it will follow from our holding today that individuals will be free to cover up the mottoes on any state's license plate if they can conceive of some possible political or philosophical opposition to the motto. We reject this suggestion. Plaintiffs have succeeded in establishing that symbolic speech is involved in this case because they have shown not only that they intended to convey a message by their act but also that the message was likely to be understood. They were able to make this latter showing principally because the New

important and substantial governmental interests. These justifications, however, fail to satisfy the third and fourth requirements of the O'Brien test.

The defacement statute furthers the New Hampshire interest in promoting appreciation of history, state pride, and tourism by preventing individuals from covering over the motto and thereby ensuring the widest possible dissemination of the message contained therein. This interest is directly related to the suppression of free expression within the meaning of O'Brien. Although a government may perhaps single out certain messages for special protection when they appear on public property, see Spence v. Washington, supra at 408-09, Spence teaches that the governmental interest in preventing individuals from interfering with the communication of the state sponsored message by engaging in symbolic expression is not an interest that meets the third requirement of the O'Brien test. See Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1506-08 (1975). In Spence the Court indicated that the state interest in preventing interruption of the set of messages conveyed by the flag was directly related to the suppression of free expression. 418 U.S. at 412-14 & n. 8. The fact that plaintiffs' act, unlike that of the defendant in

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Hampshire motto itself possesses obvious political and philosophical significance. We doubt that symbolic speech could be shown in this type of a case when the motto has no such significance.

Spence, is the only practical alternative to displaying the motto indicates that the statute and the suppression of freedom of expression are even more closely related in the present case than in Spence.

Second, even if the statute's other objective -- requiring that "Live Free or Die" appear on all cars in order to facilitate identification of New Hampshire passenger vehicles -- might be considered unrelated to speech, this purpose clearly fails the fourth requirement of O'Brien: the defacement statute's effect on plaintiffs' First Amendment freedoms is certainly "greater than is essential to the furtherance of that interest". It cannot be seriously contended that the state of New Hampshire has, to use the words of O'Brien, supra at 381, no alternative means that would more precisely and narrowly assure preservation of its interest in facilitating vehicle identification. Surely it need not structure its system of vehicle identification so that individuals will have to display a motto to which they are philosophically opposed. That the presence of this motto on the license plates is required for identification is belied by the fact that only passenger cars are required to have license plates that contain the motto "Live Free or Die".[13]

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13. Defendants suggest that, whatever the merits of placing "Live Free or Die" on the license plates, for the present the motto is needed to distinguish plaintiffs' automobile from automobiles that have no motto on their plates but have the same identification number. However, the state defendants have not shown that any New Hampshire non-passenger motor vehicles have the same identification number as plaintiffs' and there is evidence in the record suggesting that none do. So, even assuming arguendo that this would be a sufficient justification, defendants have not satisfied their burden.

Since New Hampshire's interest in the enforcement of its defacement statute is not sufficient to justify the restriction on plaintiffs' constitutionally protected expression,[14] we hold that as applied to plaintiffs NHRSA 262:27-c abridges the rights protected by the First and Fourteenth Amendments.

III. Relief

For the reasons stated above, defendants are enjoined from arresting and prosecuting plaintiffs at any time in the future for covering over that portion of their license plates that contains the motto "Live Free or Die". Although there is evidence that New Hampshire could easily issue plaintiffs license plates that do not contain the motto -- the state presently manufactures vanity plates to order at a cost of $5 -- we decline to issue an injunction ordering the state officials to do so. The relief we have ordered should fully protect plaintiffs in the exercise of their First Amendment rights, and we would be ill-advised to interfere further with the operation of New Hampshire's system of vehicle identification.

So ordered.

Frank M. Coffin
U. S. Circuit Judge

U. S. District Judge

U. S. District Judge

Dated at Concord, New Hampshire

on February 9, 1976

cc: Robert V. Johnson II, Esq.
Richard Kohn, Esq.
Peter Decato, Esq.

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14. The fact that defendants have not satisfied the O'Brien test is not necessarily dispositive of the statute's invalidity. See Spence v. Washington, supra at 414 n. 8; Ely, supra at 1496-97. It is implicit in the foregoing discussion, however, that neither of the interests New Hampshire has identified is sufficiently weighty to justify the interference with plaintiffs' protected expression.

Defendants also argue that the New Hampshire defacement statute effects such minimal interference with the values protected by the First Amendment that the state's otherwise insufficient justifications should be deemed sufficient for this case. The core of defendants' submission is that plaintiffs have equally effective alternative means of conveying their message: they could place bumper stickers near the plates which express their disagreement with the motto. We reject this argument. Spence v. Washington, supra, summarily rejected the contention that the free expression claim should fail since it was "miniscule and trifling" in view of the thousands of other available means of disseminating the views. One may not have his liberty of expression in an appropriate place abridged on the ground that the message could be conveyed in an alternative way. 418 U.S. at 411 n. 4. See Cohen v. California, 403 U.S. 15 (1971); Schneider v. State, 308 U.S. 147, 163 (1939).

APPENDIX B

U. S. Const. Amend. I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition to government for a redress of grievances."

U. S. Const. Amend. XIV, §1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New Hampshire RSA 263:1 "Number Plates"

> "Every motor vehicle operated in or on any way in this state shall have displayed conspicuously thereon a number plate or plates to be furnished by the director of the division of motor vehicles. Said director may make special regulations relative to the number of plates, the location of said plate or plates on the vehicle, and the material and design thereof; provided, however, that number plates for non-commercial vehicles shall have the state motto "live free or die" written thereon. The plates shall be kept clean."

New Hampshire RSA 262:27-c "Misuse of Plates"

> "Any person who knowingly attaches or permits to be attached to a motor vehicle a number plate assigned by the director or authority of any other jurisdiction, to another vehicle or who knowingly obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle or who knowingly and deliberately fails to display on a motor vehicle proper lights, as herein provided, or the number plates and the registration number duly issued therefor shall be guilty of a misdemeanor."

Supreme Court, U. S.
FILED
AUG 4 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1453

NEAL R. WOOLEY, individually and as
Chief of Police, Lebanon, New Hampshire,
PAUL A. DOYON, individually and as
Director of the New Hampshire State Police, and
FREDERICK N. CLARKE, JR., individually and as
Commissioner of the
New Hampshire Department of Motor Vehicles,

Appellants

v.

GEORGE MAYNARD and MAXINE MAYNARD,

Appellees.

BRIEF FOR APPELLANTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1453

NEAL R. WOCLEY, individually and as Chief of Police, Lebanon, New Hampshire, PAUL A. DOYON, individually and as Director of the New Hampshire State Police, and FREDERICK N. CLARKE, JR., individually and as Commissioner of the New Hampshire Department of Motor Vehicles,

Appellants,

v.

GEORGE MAYNARD and MAXINE MAYNARD,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the District of New Hampshire (App. 67) is reported at 406 F. Supp. 1381.

JURISDICTION

This appeal is from the judgment and permanent injunction of the United States District Court for the District of New Hampshire, a three-judge Court convened by requirement of 28 U.S.C. §2281, in a civil action instituted by the Appellees, pursuant to 42 U.S.C. §1983. The action sought to restrain the enforcement of a State statute upon the ground of the unconstitutionality of the statute. The judgment and permanent injunction were entered on February 9, 1976. (App. 77). Notice of appeal to this Court was filed by the Appellants on February 17, 1976 (App. 78), the jurisdiction of this Court being invoked pursuant to 28 U.S.C. §1253. Probable jurisdiction was noted by this Court on June 21, 1976.

QUESTIONS PRESENTED

I. WHETHER FEDERAL INTERVENTION IN A STATE CRIMINAL PROCEEDING IS PRECLUDED WHERE THE DEFENDANT THEREIN HAS HAD A FULL OPPORTUNITY TO UTILIZE STATE APPELLATE REMEDIES AND HAS FAILED TO DO SO.

II. WHETHER, CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE STATE OF NEW HAMPSHIRE MAY PROHIBIT BY CRIMINAL SANCTION THE KNOWING OBSCURATION OF THE WORDS "LIVE FREE OR DIE" ON NEW HAMPSHIRE MOTOR VEHICLE LICENSE PLATES.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution.

The principal federal statute involved is 42 U.S.C. §1983:

> "*Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The principal New Hampshire statutes involved are the following:

N.H. RSA 3:8

> "*State Motto.* The words 'Live Free or Die', written by General John Stark, July 31, 1809, shall be the official motto of the state."

N.H. RSA 263:1 (supp)

> "*Number Plates.* Every motor vehicle operated in or on any way in this state shall have displayed conspicuously thereon a number plate or plates to be furnished by the director of the division of motor vehicles. Said director may make special regulations relative to the number of plates, the location of said plate or plates on the vehicle, and the material and design thereof; provided, however, that number plates for non-commercial vehicles shall have the state motto 'live free or die' written thereon. The plates shall be kept clean."

N.H. RSA 262:27-c (supp)

> "*Misuse of Plates.* Any person who knowingly attaches or permits to be attached to a motor vehicle a number plate assigned by the director, or authority of any other jurisdiction, to another vehicle or who knowingly obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle or who knowingly and deliberately fails to display on a motor vehicle proper lights, as herein provided, or the number plates and the registration number duly issued therefor shall be guilty of a misdemeanor."

STATEMENT OF THE CASE

The parties have stipulated as to the facts of the case. (App. 14). A brief summary follows.

The Appellees are husband and wife and are residents of Claremont, New Hampshire. They own two non-commercial motor vehicles, a 1971 Toyota and a 1968 Plymouth, both of which are registered in the State of New Hampshire. Pursuant to N.H. RSA 263:1 (supp), two pairs of non-commercial motor vehicle license plates which bear the State Motto "Live Free or Die" were issued to the Appellees for the purpose of the registration of their vehicles.

In March or April of 1974, the Appellees commenced placing non-transparent tape over the State Motto. In May or June of the same year, Mr. Maynard literally cut out the words "or Die" on all four license plates, thereafter covering the resulting holes, as well as the words "Live Free", with non-transparent tape. (Exhibit No. 1).

On November 27, 1974, Mr. Maynard was charged by a Lebanon, New Hampshire, District Court complaint with having committed the offense of misuse of plates, contrary to N.H. RSA 262:27-c (supp), in that he knowingly attached to one of his motor vehicles license plates having been duly issued by the State Director of Motor Vehicles, but on which he knowingly had obscured or permitted to be obscured the words "Live Free or Die." (App. 17 and 18). Mr. Maynard was found guilty by the Lebanon District Court on December 6, 1974, and was ordered to pay a fine of $25.00, which fine was suspended. Mr. Maynard did not appeal this conviction.

By a Lebanon District Court complaint dated December 28, 1974, Mr. Maynard was charged with a second violation of N.H. RSA 262:27-c (supp). (App. 19 and 20). He was found guilty on January 31, 1975, was sentenced to pay a fine of $50.00 and was sentenced to the Grafton County, New Hampshire, House of Correction for six months, which imprisonment was suspended. Mr. Maynard again did not appeal the conviction. He advised the Lebanon District Court that he would refuse to pay the fines, now totaling $75.00, as a matter of conscience and not due to any inability to pay. The Lebanon District Court then ordered Mr. Maynard be committed to the House of Correction for fifteen days. He served his sentence and was released on February 15, 1975.

Prior to trial on the second complaint, Mr. Maynard was charged on January 3, 1975, with a third violation of N.H. RSA 262:27-c (supp). (App. 21 and 22). He was found guilty by the Lebanon District Court on the same date as his second conviction. The third complaint was "continued for sentence." (App. 21 and 22). Again, Mr. Maynard failed to appeal his conviction.

In his defense at the time of trial on each complaint, Mr. Maynard argued that his physical acts with respect to the license plates were the result of personal religious convictions.

On March 4, 1975, the Appellees filed with the United States District Court for the District of New Hampshire a civil complaint for declaratory and injunctive relief, naming as defendants the Appellants herein. The District Court, after notice and hearing, ruled that N.H. RSA 262:27-c (supp), as applied to the Appellees herein, is violative of the First and Fourteenth Amendments and permanently enjoined the Appellants herein "from arresting and prosecuting plaintiffs at any time in the future for covering over that portion of their license plates that contains the motto "Live Free or Die." (App. 76).

SUMMARY OF ARGUMENT

The circumstances of this case, involving State misdemeanor prosecutions for misuse of motor vehicle license plates, preclude federal intervention. Criminal actions were brought only against Appellee Mr. Maynard. His constitutional claims were raised in the State court proceedings and were disposed of by the judgments rendered against him. Thereafter having elected neither to request the transfer of the constitutional issues to the New Hampshire Supreme Court nor to exercise his absolute right to appeal the judgments to the New Hampshire Superior Court for a trial *de novo* by jury, intervention by a United States District Court and the granting of permanent injunctive relief frustrates all principles of equity, comity and federalism. The evidence is that of good faith attempts to enforce a State statute, of the ability of the State courts to protect federal constitutional rights, and of no irreparable injury to Appellee Mr. Maynard in the absence of federal intervention. With respect to Appellee Mrs. Maynard, there is no evidence of deprivation by the

Appellants of any of her federal constitutional rights. In addition, her interests are so closely related to those of her husband that the principles of *Younger* vs. *Harris,* 401 U.S. 37 (1971), preclude federal relief in an action commenced under 42 U.S.C. §1983.

Prohibition by criminal sanction by the State of New Hampshire of obscuration of the letters and numbers on duly issued motor vehicle license plates is clearly within the police power of the State and furthers substantial State interests, not the least of which is the establishment of a uniform motor vehicle registration system. Accordingly, the obscuration by the Appellees of the State Motto "Live Free or Die" on their license plates is punishable in the absence of any infringement of their First Amendment rights. To require a person who registers a motor vehicle in New Hampshire and who utilizes this State's highways to attach to his motor vehicle license plates bearing the State Motto constitutes no required affirmation of belief on the part of that person. *State* vs. *Hoskin,* 112 N.H. 332 (1972). The acts of the Appellees in physically removing and obscuring the State Motto on their license plates do not constitute symbolic speech. A careful analysis of the circumstances of this case satisfies the standards for justified governmental regulation set forth in *United States* vs. *O'Brien,* 391 U.S. 367 (1968). Neither by their conduct nor by a combination of their conduct and surrounding circumstances did the Appellees convey any particularized message likely to be understood. Their acts, without explanation, are interpretable only as whimsy or bizarre behavior. Any communication peculiar to their acts falls far short of warranting First Amendment protection.

ARGUMENT

I.

FEDERAL INTERVENTION IN A STATE CRIMINAL PROCEEDING IS PRECLUDED WHERE THE DEFENDANT THEREIN HAS HAD A FULL OPPORTUNITY TO UTILIZE STATE APPELLATE REMEDIES AND HAS FAILED TO DO SO.

On three separate occasions Appellee Mr. Maynard was summoned to appear before the Lebanon, New Hampshire, District Court for violations of N.H. RSA 262:27-c (supp), which provides in pertinent part:

> "*Misuse of Plates.* Any person . . . who knowingly obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle . . . shall be guilty of a misdemeanor."

Conviction of a misdemeanor is punishable by a sentence of imprisonment not to exceed one year and a fine not to exceed one thousand dollars. (N.H. RSA 651:2, II (c) and IV (a)). Under New Hampshire's two-tier judicial system, district courts have original, but not exclusive, jurisdiction over misdemeanor cases. (See: New Hampshire Constitution, Part II, Art. 77; N.H. RSA 502-A:11; *State* vs. *Handfield,* 115 N.H. ____, 348 A.2d 352 (1975), *cert. denied,* ____ U.S. ____, June 30, 1976.) Upon conviction a defendant is afforded an absolute right of appeal and trial *de novo* by jury, unless waived, to the superior court. (*State* vs. *Handfield, supra,* at 353). Constitutional issues not only may be raised by a defendant before either the district or superior courts, but also upon request of a defendant may be reserved and transferred without ruling to the New Hampshire Supreme Court. (N.H. RSA 502-A:17-a (supp)).

At the time of Appellee Mr. Maynard's first appearance before the district court, he raised a First Amendment defense. (App. 30-32; Exhibit No. 3). He likewise raised a similar defense when appearing before the district court to answer to the second and third criminal complaints. (App. 30-32; 21 and 22). However, during the course of each trial Mr. Maynard elected neither to request the reservation and transfer of constitutional issues directly to the New Hampshire Supreme Court nor to appeal his convictions to the superior court. Instead, he filed with the United States District Court for the District of New Hampshire a complaint for declaratory and injunctive relief.

The position of the Appellants is that federal intervention under these circumstances is improper. In *Younger* vs. *Harris*, 401 U.S. 37 (1971), this Court reaffirmed the "longstanding public policy against federal court interference with state court proceedings" (*Ibid,* at 43), citing as a fundamental reason for this policy

> ". . . the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the

moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." (*Ibid,* at 43-44).

In *Younger* the appellee had been indicted and a district court enjoined further state prosecution, finding unconstitutional the particular state statute. This Court reversed, stating:

> "It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." (*Ibid,* at 54).

In the instant case, however, the District Court dismissed any applicability of the *Younger* doctrine of equitable restraint on the basis that the Appellees did not seek to enjoin a pending criminal prosecution. (App. 70). While it is correct that guilty verdicts had been rendered, Mr. Maynard had complied with the sentence imposed upon him in each of the three criminal cases and no appeal was pending at the time he sought federal injunctive relief, the Appellants contend that the intended effect of the *Younger* decision is negated by the District Court. "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." (*Ibid,* at 43). The effect of *Younger* was to reinforce this longstanding policy. However, the District Court's exiguous interpretation of *Younger,* concluding that application of *Younger* hinges upon the pendency of a state criminal prosecution, is not only contrary to this historical policy, but also finds no support in *Younger.* In *Younger* this Court commented: "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." (*Ibid,* at 41). See also: *Samuels* vs. *Mackell,* 401 U.S. 66, at 73-74 (1971).

In *Steffel* vs. *Thompson,* 415 U.S. 452 (1974), this Court authorized a declaratory judgment to issue by a district court

restraining the enforcement of a Georgia statute upon a finding of the statute being unconstitutional as applied. The Appellants herein distinguish *Steffel* on two bases. First, the action in *Steffel* was instituted under the Federal Declaratory Judgment Act (28 U.S.C.S. §§2201-2202), whereas the complaint of the Appellees sought declaratory and injunctive relief under 42 U.S.C. §1983. (App. 5). Moreover, the permanent injunctive relief granted by the District Court in the instant case clearly constitutes the type of federal interference which Declaratory Judgment Act was intended to avoid. (See: *Perez* vs. *Ledesma,* 401 U.S. 82, at 111-115 (1971)). Second, at the time a petition for declaratory judgment was filed in *Steffel* not only was no state criminal prosecution pending, but also none had been commenced and terminated. The petitioner in *Steffel,* therefore, in comparison with Appellee Mr. Maynard, had not had the opportunity to vindicate his constitutional rights in state judicial proceedings. This second distinction is also applicable to *Doran* vs. *Salem Inn, Inc.,* 422 U.S. 922 (1975), in which this Court permitted federal declaratory relief to be granted under 42 U.S.C. §1983 to two co-plaintiffs which "were *not* subject to state criminal prosecution *at any time* prior to the issuance of a preliminary injunction by the District Court" (*Ibid,* at 930, italics supplied), but denied the granting of similar relief to a third co-plaintiff against which state criminal proceedings had been commenced. (*Ibid,* at 929). Neither *Steffel* nor *Doran* expressly authorize federal intervention and injunctive relief in an instance in which a state defendant has been afforded the opportunity to litigate his constitutional rights. In fact, in each case, this Court reaffirmed the fundamental policy of non-intervention enunciated in *Younger.* (*Ibid,* at 45).

Appellee Mr. Maynard raised and litigated his constitutional claim before the Lebanon, New Hampshire, District Court. (Exhibit No. 3. However, see Opinion, footnote 6, App. 70, to the contrary.) In light of Mr. Maynard's election neither to request the reservation and transfer of constitutional issues nor appeal the judgments, the constitutional issue was decided. Consequently, principles of collateral estoppel and *res judicata* preclude subsequent federal intervention designed to relitigate the same issue and calculated to nullify the prior State court proceedings. *Bricker* vs.

Crane, 468 F.2d 1228, 1231 (1st Cir. 1972), *cert. denied* 410 U.S. 930 (1973); *Mastracchio* vs. *Ricci,* 498 F.2d 1257 (1st Cir. 1974), *cert. denied* 420 U.S. 909 (1975).

Under the circumstances of this case, the position of the Appellants that federal intervention is improper and unwarranted does not result in the Appellees being placed "between the Scylla of intentionally flouting state law and the Charybdis of foregoing what (they) believe(s) to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." (*Steffel, supra,* at 462). The initial and repeated acts of Appellee Mr. Maynard in obscuring the State Motto on his motor vehicle license plates constituted knowing violations of State law. (App. 17-22). By his deliberate conduct he selected the judicial forum within which to have heard his constitutional claims, foregoing the commencement of a federal action for declaratory relief and electing, instead, criminal prosecution within the State courts. Having thus elected and there being no evidence before this Court that the New Hampshire State courts are unable to protect his constitutional rights, the exhaustion of State judicial remedies becomes preferable if not mandatory. The circumstances of this case are distinguishable from *Monroe* vs. *Pape,* 365 U.S. 167 (1961), in which no state proceedings had been commenced, *McNeese* vs. *Board of Education,* 373 U.S. 668 (1963), in which the efficacy of state administrative relief was insufficient (*Ibid,* at 674), and *Zwickler* vs. *Koota,* 389 U.S. 241 (1967), in which the challenged state statute was not susceptible to narrowing state court construction. (*Ibid,* at 250). In *Ellis* vs. *Dyson,* 421 U.S. 426 (1975), the petitioners, after being convicted under a state loitering ordinance, were permitted to seek federal declaratory relief rather than seeking a trial *de novo* within the state judicial system. While this Court stated that exhaustion of state judicial remedies is unnecessary prior to an action under 42 U.S.C. §1983, this Court also expressly noted that the petitioners not only had sought and been denied at the state level a writ of prohibition against their prosecution, but also that their right of appellate review at the state level was restricted. The Appellants herein submit that circumstances such as those present in *McNeese* and *Ellis* may provide sufficient grounds for the invocation of federal intervention prior to the exhaustion of state judicial remedies. However, in the absence of any such circumstances, considerations of equity, comity and federalism mandate federal abstention until the exhaustion of state judicial remedies. This analysis is supported by *Huffman* vs. *Pursue, Ltd.,* 420 U.S. 592 (1975), in which the appellees were denied federal injunctive and declaratory relief after having been found guilty of violation of an Ohio nuisance statute and having failed to appeal that judgment within the Ohio court system. In his majority opinion, Mr. Justice Rehnquist reasoned:

> "Appellee contends that even if *Younger* is applicable to civil proceedings of this sort, it nonetheless does not govern this case because at the time the District Court acted there was no longer a 'pending state court proceeding' as that term is used in *Younger*. *Younger* and subsequent cases such as *Steffel* have used the term 'pending proceeding' to distinguish state proceedings which have already commenced from those which are merely incipient or threatened. Here, of course, the state proceeding had begun long before appellee sought intervention by the District Court. But appellee's point, we take it, is not that the state proceeding had not begun, but that it had ended by the time the District Court complaint was filed.
>
> "Appellee apparently relies on the facts that the Allen County Court of Common Pleas had already issued its judgment and permanent injunction when this action was filed, and that no appeal from that judgment has ever been taken to Ohio's appellate courts. As a matter of state procedure, the judgment presumably became final, in the sense of being nonappealable, at some point after the District Court filing, possibly prior to entry of the District Court's own judgment, but surely after the single judge stayed the state court's judgment. We need not, however, engage in such inquiry. For regardless of when the Court of Common Pleas' judgment became final, *we believe that a necessary concomitant of* Younger *is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in* Younger.
>
> "Virtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to

completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial. Intervention at the later stage is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state appellate courts. Nor, in these state-initiated nuisance proceedings, is federal intervention at the appellate stage any the less of a disruption of the State's efforts to protect interests which it deems important. Indeed, it is likely to be even more disruptive and offensive because the State has already won a *nisi prius* determination that its valid policies are being violated in a fashion which justifies judicial abatement.

"Federal post-trial intervention, in a fashion designed to annul the results of a state trial, also deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction. We think this consideration to be of some importance because it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. Especially is this true when, as here, the constitutional issue involves a statute which is capable of judicial narrowing. *In short, we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts. We therefore hold that* Younger *standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies.*" (Ibid, at 607-609, italics supplied).

In the instant case the District Court summarily dismissed any applicability of this Court's opinion in *Huffman,* stating: "*Huffman,* however, is readily distinguishable. *Huffman,* like *Younger,* was a case in which granting the requested injunctive relief would have interfered with the processes of the state court by nullifying prior or pending state court proceedings. Here, no such interference can result." (App.

69-70). While this conclusion is apparently premised on the narrow analysis that the Appellees are seeking only prospective relief from further prosecution, the Appellants submit that the practical effect upon the State of New Hampshire as a result of the federal judicial intervention and injunctive relief granted is identical to that which this Court found inflicted upon the State of Ohio in *Huffman,* that is, that the interference ". . . has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws." (*Huffman, supra,* at 605). (See also: *Steffel, supra,* at 466). The action of the District Court effectively nullified the prior State criminal proceedings against Appellee Mr. Maynard, condoned his engaging in conduct which the criminal laws of the State of New Hampshire prohibit, and infringed upon the sovereign State derived authority of the Appellants to administer and enforce laws as substantive as those constituting the motor vehicle registration system of the State of New Hampshire. It is precisely these types of adverse effects upon the legitimate interests of the states that caused Mr. Justice Holmes in 1926 to observe that the doctrine of equitable restraint "should be very strictly observed." *Massachusetts State Grange* vs. *Benton,* 272 U.S. 525, at 529 (1926).

The New Hampshire Supreme Court in *State* vs. *Hoskin,* 112 N.H. 332 (1972), sustained convictions of obscuration of the State Motto on New Hampshire motor vehicle license plates, holding that the defendant's First Amendment right to be free from a required affirmation or belief was not infringed. While the Appellees herein contend, in comparison, that their constitutional right to symbolic speech is infringed, the *Hoskin* case was cited to Appellee Mr. Maynard during his first trial in the Lebanon, New Hampshire, District Court. (Exhibit No. 3, App. 30). Any argument by the Appellees, however, that in light of *Hoskin* an appeal would have been futile is succintly answered by the fact that the issue presented by the Appellees was not decided in *Hoskin.* In addition and

"(m)ore importantly, we are of the opinion that the considerations of comity and federalism which underlie

Younger permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious. . . . Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do." (*Huffman* vs. *Pursue, Ltd., supra,* at 611).

The District Court ruled that "Even if the doctrine of equitable restraint barred Mr. Maynard's suit . . . (his) failure to appeal his state convictions could not bar Mrs. Maynard's federal action for protection from future state criminal prosecution." (App. 70). The Appellants disagree. The parties stipulated that Mrs. Maynard is a co-owner of the two motor vehicles (App. 14) and shares her husband's religious beliefs (App. 45). And while it was further stipulated that she would have testified that she permitted to be obscured the State Motto on the license plates (App. 46), the evidence is that she was not present and took no part in the criminal activity of Mr. Maynard. (App. 39). There also is no evidence that she *knowingly* permitted the obscuration of the license plates. (N.H. RSA 262:27-c (supp), *supra*). No State criminal proceeding had been commenced against her at the time of the District Court filing. The federal action of the Appellees sought relief under 42 U.S.C. §1983 (App. 5) and, accordingly, the burden of proof in part of Appellee Mrs. Maynard was to show that the Appellants had subjected her to the deprivation of her First Amendment right to freedom of speech. The Appellants argue that this requisite burden of proof was not satisfied. Unlike the petitioners in *Steffel* vs. *Thompson, supra,* Mrs. Maynard engaged in no activities with which the Appellants interfered. Therefore, Mrs. Maynard's action fails, not as the District Court held by reason of Mr. Maynard's failure to appeal his State convictions, but due to her failure to prove a *prima facie* case under 42 U.S.C. §1983. Had Appellee Mrs. Maynard sought declaratory relief under the Federal Declaratory Judgment Act (28 U.S.C. §2201), then her threshold burden would have been to demonstrate clearly that there was a continuing "actual controversy". (*Steffel* vs. *Thompson, supra,* at 458 and *Ellis* vs. *Dyson, supra,* at 433). Since she failed to request such relief, the Appellants, subject only to the observation that there is no evidence that Mrs. Maynard *planned* to engage in

conduct for which she feared prosecution, do not address herein the issue of whether a genuine controversy exists between Mrs. Maynard and the Appellants. (See: *Younger* vs. *Harris, supra,* at 42). Finally, with respect to Appellee Mrs. Maynard, the Appellants note that she is the wife of Mr. Maynard, is co-owner of the motor vehicles, and "shares her husband's religious beliefs". (App. 45). In addition, the facts and testimony before the District Court suggest that Mrs. Maynard's religious actions and beliefs are strongly influenced by her husband. (App. 25-29, 39, 46). For these reasons, the Appellants contend that the Appellees, while being " . . . legally distinct parties (,) are so closely related that they should all be subject to the *Younger* considerations which govern any one of them. . . ." (*Doran* vs. *Salem Inn, Inc., supra,* at 928). But for the religious convictions and criminal conduct of Mr. Maynard, it is highly doubtful that Mrs. Maynard would have instituted federal litigation. There has been no infringement of her First Amendment rights.

II.

CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE STATE OF NEW HAMPSHIRE MAY PROHIBIT BY CRIMINAL SANCTION THE KNOWING OBSCURATION OF THE WORDS "LIVE FREE OR DIE" ON NEW HAMPSHIRE MOTOR VEHICLE LICENSE PLATES.

N.H. RSA 262:27-c (supp), entitled "Misuse of Plates", establishes the misdemeanor offense of knowingly obscuring or permitting to be obscured the figures or letters on any license plate attached to any motor vehicle. The source of this statute is *N.H. Laws 1905,* ch. 86, §2, which provided for the registration of all automobiles; §5, which provided that the "registered number or mark is at all times (to be) displayed . . . as to be unobstructedly visible"; and §10, which established the penalty upon conviction. In 1911, ch. 86 of the *N.H. Laws 1905* was repealed by *N.H. Laws 1911,* ch.

133, §5 of which provided that every automobile "shall have its register number displayed conspicuously thereon", that the number plates "shall be kept clean", and that in the event a number plate became mutilated or illegible a mandatory obligation arose to acquire a replacement; and §18 of which set forth the offense and penalty against any person "who obscures or permits to be obscured the figures on any number plate attached to any motor vehicle." In 1971, ch. 133 of the *N.H. Laws 1911* was repealed by *N.H. Laws 1921*, ch. 119, §§3(a), 5 and 17 of which, however, carried forth the 1911 provisions cited above. In 1957, N.H. RSA 262:27 was amended to include the element of knowledge in the crime of obscuring or permitting to be obscured the figures on any number plate. In 1967, the statute was amended to include "figures *or letters*."

With regard to the particular letters and figures appearing on number plates, the original 1905 New Hampshire legislation required the New Hampshire Secretary of State to issue license plates "bearing the distinguishing number or mark of his vehicle, followed by the letters N.H." *N.H. Laws 1905*, ch. 86, §2. Subsequently, the Secretary of State was instructed to include "figures showing the year of issue." *N.H. Laws 1911*, ch. 133, §2. In 1943, the issuance of license plates having been transferred to the New Hampshire Commissioner of Motor Vehicles, the Commissioner was authorized to "make special regulations relative to the number of plates, material and design thereof." *N.H. Laws 1943*, ch. 3, §2. N.H. RSA 260:9 (supp) also provides for the issuance of license plates "of suitable design."

Prior to 1957 license plates each year included, in addition to the numbers and letters, the abbreviation "N.H." or the words "New Hampshire." Between the years 1957 and 1970, all license plates included, in addition to the words "New Hampshire", the word "Scenic", with the exception, however, of 1963, in which year the word "Photoscenic" was substituted for the word "Scenic." These variations were initiated pursuant to the authority granted by N.H. RSA 263:1 (supp) to the Commissioner or Director of Motor Vehicles. In 1945, the New Hampshire General Court adopted the words "Live Free or Die" as the official New Hampshire State Motto (N.H. RSA 3:8) and in 1969 directed that the State Motto appear on all license plates for non-commercial motor vehicles. (N.H. RSA 263:1 (supp)). Accordingly, beginning in 1971 all non-commercial vehicles have been issued license plates having, in addition to the particular letters and numbers for the vehicle, the words "New Hampshire" and the words "Live Free or Die." The full text of N.H. RSA 263:1 (supp) is as follows:

> "Number Plates. Every motor vehicle operated in or on any way in this state shall have displayed conspicuously thereon a number plate or plates to be furnished by the director of the division of motor vehicles. Said director may make special regulations relative to the number of plates, the location of said plate or plates on the vehicle, and the material and design thereof; provided, however, that number plates for non-commercial vehicles shall have the state motto 'live free or die' written thereon. The plates shall be kept clean."

For the calendar year 1974, the State of New Hampshire issued approximately 526,000 license plates. (App. 49). Of these, approximately 325,000 were issued for non-commercial vehicles and contained the State Motto. (App. 50). The balance—those not containing the State Motto, were issued either for special categories of commercial vehicles—general commercial (55,000), tractor (15,000), trailer (60,000), agricultural (5,500), farm (3,250), antique (800), ambulance (+) (300), transportation (300), repair (625) and diesel (6,000), or, by legislative direction, for special individuals or State or local government departments, for example, governor, governor's council, president of the senate, members of the senate, speaker of the house of representatives, members of the house of representatives, the attorney general and his deputy, county sheriffs, deputy sheriffs, and vehicles of State police and State motor vehicle departments (N.H. RSA 260:10 (supp)). (See also: N.H. RSA 260:11-b, 17 and 18 (supp)). (App. 66, Exhibit No. 8).

The Appellees were issued license plates of the standard design bearing the year of issue and the State Motto at the top, identifying letters and numbers in the middle and the words "New Hampshire" at the bottom. Upon the payment of a five dollar fee, the Appellees could have obtained "vanity plates", so-called, these license plates being similar to the standard license plates with the exception that up to five letters of the applicant's choice are substituted for the iden-

tifying letters and numbers in the middle. N.H. RSA 260:10-a (supp). (App. 50). As the motor vehicles of the Appellees are non-commercial and as the Appellees are not entitled to any of the foregoing described specially-issued license plates, the Appellees have no alternative, under New Hampshire's statutory system of motor vehicle registration, but to have license plates bearing the State Motto. (App. 23, Exhibit No. 8).

The First Amendment contentions of the Appellees are, first, that the State Motto on their license plates constitutes a required affirmation or belief and, second, that their acts of obscuring the State Motto constitute protected symbolic speech. In *State* vs. *Hoskin, supra,* the New Hampshire Supreme Court dismissed the first argument, saying:

> "The defendants' membership in a class of persons required to display plates bearing the State motto carries no implication and is subject to no requirement that they endorse that motto or profess to adopt it as matter of belief. . . . [we] think that viewers do not regard the uniform words or devices upon registration plates as the craftsmanship of the registrants. They are known to be officially designed and required by the State of origin. The hard fact that a registrant must display the plates which the State furnished to him if he would operate his motor vehicle is common knowledge." (*Ibid,* at 336-337).

In the instant case, while one judge would have found N.H. RSA 262:27-c (supp) violative of Appellees' right to be free from a compelled affirmation or belief (App. 71, footnote No. 9), the District Court did not consider this argument. (App. 71). The Appellants rely upon the decision of the New Hampshire Supreme Court in *Hoskin, supra.*

The basis of the District Court's injunctive relief is its conclusion that the conduct of the Appellees constituted constitutionally protected symbolic speech. The Appellants believe this conclusion is incorrect. While certain limited types of conduct have been characterized by the courts as "symbolic speech", this "conduct" exception to the traditional view of speech as the written and spoken word is of exceedingly narrow compass and should not be extended to the facts of the instant case. Endeavors to delineate "the

nebulous realm of symbolic speech" (*Goguen* vs. *Smith,* 471 F.2d 88, at 104 (1st Cir. 1972)) have been undertaken by this Court in several recent significant cases. *United States* vs. *O'Brien,* 391 U.S. 367 (1968), presented the issue of whether the burning of a Selective Service registration certificate may be symbolic speech. While refraining from deciding whether such conduct triggers First Amendment protection, this Court sustained the defendant's conviction, holding that

> ". . . a government regulation is sufficiently justified if it (1) is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (*Ibid,* at 377, numbers supplied).

The facts of the instant case satisfy this four-prong test. First, since N.H. RSA 262:27-c (supp) embraces regulations designed to promote the general welfare, public convenience and public safety, it clearly is within the constitutional or "police power" of the State. (See, e.g., *Nashville, C. & St. L. Ry.* vs. *Walters,* 294 U.S. 405 (1935); *Nebbia* vs. *New York,* 291 U.S. 502 (1934); *Schmidinger* vs. *Chicago,* 226 U.S. 578 (1913); and *California Reduction Co.* vs. *Sanitary Works,* 199 U.S. 306, at 318 (1905); Note, *Of Shadows and Substance: Freedom of Speech, Expression, and Action,* 1971 Wisc. L. Rev. 1208 (1971)). The *New Hampshire Constitution,* Part II, Article 5, provides in part:

> ". . . full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state. . . ."

Second, the requirement that the State Motto appear on non-commercial motor vehicles (N.H. RSA 263:1 (supp) and

N.H. RSA 262:27-c (supp)) furthers important and substantial State governmental interests — the facilitating of motor vehicle identification and law enforcement, the fostering of appreciation of State history and tradition, the creating of State pride, identity and individualism, and the promoting of tourism. The overall design, material and color of a license plate, authorized by statute and duly issued by the Appellant Commissioner of the Department of Motor Vehicles, serves the purpose of vehicle identification and that purpose is defeated by the indiscriminate obscuration of all or any portion of any such license plate. Appellant Wooley, Chief of Police of Lebanon, New Hampshire, testified that enforcement of the motor vehicle laws is facilitated by the State Motto appearing on non-commercial license plates, the benefits being the ease of distinguishing New Hampshire license plates from those of similar colors of other states and the ease of discovering misuse of license plates, for instance, the use of a "trailer" license plate on a non-commercial vehicle. (App. 56-57). In *State* vs. *Hoskin, supra,* the New Hampshire Supreme Court concluded:

> "But regardless of its historical significance, the official State motto became a part of 'letters' appearing on New Hampshire registration plates, and as such served with other letters and figures *as a means of identification of the vehicles upon which it appeared. Similarly the slogans and mottoes which appear upon plates issued by other states, serve to aid in identification of vehicles registered there.*" (*Ibid,* at 334, italics supplied).

The State Motto on license plates also fosters appreciation of New Hampshire's history, tradition, pride, identity and individualism—values common to each of the fifty states of the Union. In the year 1785, the independence of the colonies having been established, the New Hampshire General Court devoted itself to framing laws designed to promote the general welfare of the State. In that year, an act was passed to establish a State Seal. 5 *Laws of New Hampshire,* First Constitutional Period 1784-1792, ch. 2, p. 40. There subsequently were established a State Flag, State Flower, State Motto, State Emblem, State Tree and State Songs. N.H. RSA 3. That such legislation legitimately furthers important or substantial governmental interests was affirmed in *Halter* vs. *Nebraska,* 205 U.S. 34 (1907):

> "As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected." (*Ibid,* at 43).
>
> "It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order and well-being of the people. Before this court can hold the statute void it must say that and, in addition, adjudge that it violates rights secured by the Constitution of the United States." (*Ibid,* at 45).

Lastly, as tourism is a primary source of income to the State of New Hampshire, the promotion of tourism by utilization of the State Motto on non-commercial motor vehicles registered in New Hampshire is also distinctly designed to further an important and substantial government interest. In *Froslid* vs. *Hults,* 248 N.Y.S.2d 676, 20 A.D.2d 498, *appeal dismissed* 199 N.E.2d 166, 14 N.Y.2d 722, 250 N.Y.S.2d 68 (1964), the New York State Commissioner of Motor Vehicles, under statutory authority, prescribed that the words "Worlds' Fair" be placed on license plates issued in 1964 and 1965. In upholding the constitutionality of this regulation, the Court concluded that license plates may serve public purposes other than the raising of revenue and vehicle identification. They also may serve the purpose of promoting tourism.

The third prong of the *O'Brien* analysis is that N.H. RSA 262:27-c (supp) must further a governmental interest which is unrelated to the suppression of free expression. The holding of the District Court, below, that since the statute ensures the widest possible dissemination of "the message" contained in the State Motto the statute "is directly related to the suppression of free expression" (App. 75), transgresses the scope of *O'Brien.* In *O'Brien,* this Court observed: "A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax

law prohibiting the destruction of books and records." (*Ibid*, at 375). While the defendant in *O'Brien* was obliged to keep his Selective Service certificate in his personal possession at all times, the Appellees herein are obliged only to operate their motor vehicles with duly issued State license plates. And in the factual situation of *O'Brien*, "the message" of the defendant's Selective Service certificate was much more particularized than "the message" of the State Motto on a New Hampshire motor vehicle license plate. The District Court's holding is also assailable by analogy to the legal requirement (31 U.S.C. §324-a) that our National Motto, "In God We Trust", appear on all our coins and currency. This requirement ensures even greater dissemination of "the message" since currency is personally passed by hand. Nevertheless, it is a federal felony to alter, deface, mutilate, or impair any coins or any evidence of national bank obligations. 18 U.S.C. §§331 and 333.[1] To deface a coin or federal bank note by obscuring the National Motto clearly tends to defeat the establishment of a uniform national monetary system — a governmental interest which is unrelated to the suppression of free expression. Likewise, to deface a license plate by obscuring the State Motto clearly tends to defeat the establishment of a duly authorized uniform State motor vehicle registration system. For this reason, the second significant case of symbolic speech decided by this Court, *Spence* vs. *Washington*, 418 U.S. 405 (1974), is inapposite for while the defacement of a flag was found not to impair significantly any interest of the State of Washington in preserving the integrity of a privately-owned flag, in the instant case the significant interest of the State of New Hampshire in a uniform system of motor vehicle identification was directly impaired by the acts of the Appellees in defacing State-issued license plates.

For the State of New Hampshire to require that no portion of the letters or numbers on license plates be obscured has no relationship to the freedom of expression of the Appellees. With absolutely no fear of prosecution, the Appellees are at liberty to criticize or denounce the State Motto of New Hampshire, selecting their own preferred and practically

[1] See App. 41.

unlimited modes of verbal or written expression. That Appellee Mr. Maynard, a printer by trade, is cognizant of these opportunities is evidenced by his testimony:

"XQ. But you could print a bumper sticker relative to your disagreement with the slogan "Live Free or Die," could you not?

A. Yes, but the State would object to it.

XQ. What makes you say that?

A. Well, if I had a bumper sticker to show any objection to the "Live Free or Die," I would have an illustration of a dog raising his leg on the State Motto.

. . .

XQ. So there would be no law that you would be breaking if you were to make such a bumper sticker and adhere it to your car, would there, to your knowledge?

A. That's right. I wouldn't be breaking a law, that's correct." (App. 39).

Whatever their attitudes and eccentricities may be (App. 37-38, 40-41), the Appellees may express them free of censor and in accordance with the rationale behind the First Amendment — the free trade in ideas.

The fourth prong of the *O'Brien* analysis is that the incidental restriction on the Appellees' First Amendment freedoms occasioned by N.H. RSA 262:27-c (supp) must be no greater than is essential to the furtherance of the State's interests. The Appellants submit that this particular analysis does not require them to prove that there is "no less restrictive alternative capable of serving the state's interest as efficiently as it is served by the regulation under attack." Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, at 1484-1485 (1975). To impose such a burden would serve to justify a finding of unconstitutional-

ity of any regulation resulting in incidental restrictions on First Amendment freedoms. In the instant case, for instance, it is possible for the State of New Hampshire to establish a workable motor vehicle registration system without utilizing the State Motto on license plates, to foster appreciation of State history and tradition by massive educational efforts, to create State pride, identity and individualism by holding patriotic oriented events, and to promote State tourism by the expenditure of additional monies for customary promotional advertising.[2] The futility of this "less restrictive alternative" approach to the fourth prong of the *O'Brien* test suggests that

> "The critical question would therefore seem to be whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatever." (88 Harv. L. Rev., *supra,* at 1497).

Applying this analysis to N.H. RSA 262:27-c (supp), the conclusion must be that the foregoing enunciated purposes of the statute have no relationship whatsoever with communication on the part of the Appellees. In other words, the obscuration by the Appellees of the State Motto on their license plates would defeat the purposes of its presence regardless of the communicative significance of the conduct and even if the conduct had no communicative significance whatsoever.

Application of the *O'Brien* analysis presupposes, however, that the conduct of the Appellees constituted symbolic

[2] See, however, *O'Brien, supra,* at 381: "We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction." This observation equally could be applied to motor vehicle license plates. Yet, as the Appellants herein acknowledge possible alternative, but less desirable, means to further the same State interests, so are there possible alternative means to assure the availability of Selective Service certificates. See 88 Harv. L. Rev., *supra,* at 1487.

speech. The District Court so found. The Appellants conclude otherwise. The acts of Appellee Mr. Maynard in physically cutting out a portion of and placing non-transparent tape over the remaining portion of the State Motto on his license plates (App. 17-22) were undertaken by him in the privacy of the driveway of his residence, in the probable absence of any other persons, and in connection with which he made no written statement and either made no verbal statement or, if he did, he "can't recall." (App. 39-40). (See, *Street* vs. *New York,* 394 U.S. 576, at 585 (1969)). In light of these circumstances, any communicative characteristic of his conduct necessarily would have had to have arisen subsequently when the Appellees' motor vehicles were exposed to the public. (See *Spence, supra,* at 409). So the crucial question is whether, upon another person's observing non-transparent tape over the State Motto, "(a)n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." (*Spence, supra,* at 410-411).

The source of New Hampshire's State Motto derives from General John Stark who in 1809 wrote a letter to his old Vermont comrades declining for reasons of health to attend the 32nd reunion of the 1777 battle of Bennington in which he had commanded the Continental troops in a decisive battle defeating the British and German.[3] At the conclusion of his letter in 1809, General Stark proposed a toast for the reunion: "Live free or die; Death is not the worst of evils." Moore, Howard P., *A Life of General John Stark of New Hampshire,* p. 500 (1949); Pillsbury, Hobart, *New Hampshire–A History,* Vol. II, p. 385 (1927). Appellee Mr. Maynard's testimony concerning his disagreement with his understanding of the words "Live Free or Die" (App. 25-28, 36-37, 41-42) was summarized by the District Court as ". . . deeply held, fundamentally religious beliefs that death is an unreality for a follower of Christ and, to a lesser extent, that it is wrong to give up one's earthly life for the state, even if

[3] The United States flag had been adopted by Congress on June 14, 1777, and General Stark's army at the battle of Bennington carried the stars and stripes for the first time on any battlefield.

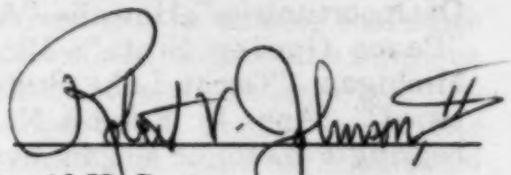
the alternative is living in bondage." (App. 71). For some persons, the words "Live Free or Die" may have political or philosophical significance; however, the phrase is not conducive to a general universal interpretation. Therefore, the observation by another person that the State Motto on Appellees' motor vehicles had been covered over with tape cannot be said to convey any message other than that the Appellees were violating the law (App. 29) or that for some unknown reason they preferred not to exhibit the State Motto. The message conveyed certainly was not the religious or philosophical concepts of Mr. Maynard, either as testified to by him or summarized, above, by the District Court. The only message which the District Court found communicated was the Appellees' "strong disagreement with implications of the message (State Motto)." (App. 71). This falls far short of meeting the "particularized message" standard of *Spence*. Furthermore, in *Spence* the surrounding circumstances — the special nature of flags, the peace symbol and current (1970) "issues of great public moment . . . the Cambodian incursion and the Kent State tragedy" (*Spence, supra,* at 410), acted not only to particularize the actor's message, but also to establish the requisite great likelihood that the message would be understood by those who viewed it. (See also, *Tinker* vs. *Des Moines Independent School District,* 393 U.S. 503 (1969)). In comparison, the instant case is devoid of any relevantly meaningful surrounding circumstances which conceivably could have rendered the "message" likely to be understood. The District Court acknowledged that ". . . the act of covering the motto on a license plate may, in some cases, be an act of pure whimsy." (App. 71). The Appellants submit that but for the *post facto* courtroom explanation by Mr. Maynard of his conduct, his conduct in fact would be pure whimsy. This crucial distinction between conduct which, by its intrinsic nature and by surrounding circumstances conveys without further explanation a particularized message likely to be understood, and, on the other hand, conduct which, due to its ambiguous nature and by the absence of relevant surrounding circumstances conveys no particularized message likely to be understood without further explanation, was recognized by this Court in *Spence*: "A flag bearing a peace symbol and displayed upside down by a student today (June, 1974) might be interpreted

as nothing more than bizarre behavior. . . ."(*Spence, supra,* at 410). (Date supplied). It is prevalent among all the fifty states that mottoes or slogans appear on license plates: for example, Oklahoma—"Oklahoma Is OK"; Nebraska—"Cornhusker State"; Idaho—"Famous Potatoes"; Florida—"Sunshine State"; North Carolina—"First In Freedom"; Connecticut—"Constitution State"; Albama—"Heart of Dixie"; Louisiana—"Sportman's Paradise"; Arkansas—"Land Of Opportunities"; Hawaii—"Aloha State"; North Dakota—"Peace Garden State"; Illinois—"Land of Lincoln"; Michigan—"Great Lake State"; Ohio—"Seat Belts Fastened?", (App. 48; Exhibit No. 7). Any such license plate bearing a motto or slogan, even one which may be interpreted to have political or philosophical overtones such as "Live Free or Die", "Land of Lincoln", "First In Freedom", or "Peace Garden State", does not constitute an emotionally charged symbol such as a flag or a draft card and, therefore, does not reach the unique communicative connotations inherent in these objects. (See: *Board of Education* vs. *Barnette,* 319 U.S. 624, at 632 (1943); *Stromberg* vs. *California,* 283 U.S. 359, at 369 (1931); Note, *Symbolic Expression: Flag Desecration–Attitudes and the Law,* V Suffolk Uni. L. Rev. 442, at 466 (1971)). Consequently, if the act of placing tape over such a motto or slogan on a license plate is to rise to the level of symbolic speech, then the speech element of the act must of necessity be more communicative than the nonspeech element of the act. (*Crosson* vs. *Silver,* 319 F. Supp. 1084, at 1087 (D.C., Dist. of Ariz., 1970)). Since this case does not present such a situation, the conduct of the Appellees fails to warrant First Amendment protection.

CONCLUSION

For the reasons stated, the Appellants respectfully submit that the judgment of the Court below should be reversed.

Respectfully submitted,



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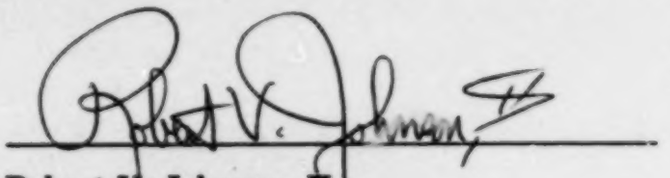
CERTIFICATE OF SERVICE

I, Robert V. Johnson, II, Assistant Attorney General, State of New Hampshire, one of counsel for Appellants, hereby certify that the foregoing Brief For Appellants was served on the Appellees by depositing three copies each of same in the United States Mail, first class postage prepaid, this second day of August, 1976, addressed to counsel for Appellees, R. David DePuy, Esquire, and Jack B. Middleton, Esquire, 40 Stark Street, Manchester, New Hampshire 03105, and Richard S. Kohn, Esquire, Suite 526, 733 15th Street, N.W., Washington, D.C. 20005.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1453

NEAL R. WOOLEY, etc. et al.,

Appellants,

v.

GEORGE MAYNARD, et ux.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF FOR APPELLEES

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IN THE

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Appellants,

v.

GEORGE MAYNARD, et ux.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the United States District Court for the District of New Hampshire (App. 67-77) is reported at 406 F. Supp. 1381.

JURISDICTION

The judgment of the United States District Court for the District of New Hampshire was entered on February 9, 1976 (App. 77). Notice of Appeal to this Court was

filed by the Appellants on February 17, 1976 (App. 78). The jurisdiction of this Court was properly invoked, under 28 U.S.C. §1253. Probable jurisdiction was noted by this Court on June 21, 1976.

QUESTIONS PRESENTED

I.

Whether principles of *Comity*, *Equity* and *Federalism* bar Mr. Maynard's federal action for declaratory and injunctive relief because he did not appeal prior state court convictions when, at the time the federal suit was filed, no state criminal proceedings were pending against him, the relief sought was prospective only, and no attempt was made to attack collaterally his state court convictions.

II.

Whether the affirmative defenses of *res judicata* and collateral estoppel are properly before the Court and, if so, whether those defenses can be applied to defeat Mr. Maynard's federal action where the constitutional issues were not actually litigated in the state court proceedings and where Mr. Maynard did not elect the state court as his forum.

III.

Whether Mrs. Maynard can be barred from instituting a federal civil rights action by her husband's failure to appeal prior convictions where she has never been prosecuted, but shares her husband's religious conviction

against the motto and has been threatened with prosecution if she operates their motor vehicle with the motto taped over.

IV.

Whether the Maynards' conduct in taping over the motto "Live Free or Die" on their license plates with reflective red tape constitutes symbolic expression protected by the First Amendment which outweighs any countervailing interest advanced by the state for requiring the motto to be displayed on non-commercial license plates.

V.

Whether the requirement that all non-commercial license plates bear the state motto "Live Free or Die" violates the Maynards' right under the First Amendment to be free from compelled affirmations of belief.

VI.

Whether the requirement that the Maynards display the state motto on their license plates violates the Free Exercise Clause of the First Amendment where the message conveyed by the motto is antithetical to their religious conviction that Jehovah guarantees everlasting life.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fourteenth Amendments to the United States Constitution:

U.S. Const. Amend. I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. Amend. XIV, Sec. 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New Hampshire statutes:

New Hampshire RSA 263:1 "Number Plates"

"Every motor vehicle operated in or on any way in this state shall have displayed conspicuously thereon a number plate or plates to be furnished by the director of the division of motor vehicles. Said director may make special regulations relative to the number of plates, the location of said plate or plates on the vehicle, and the material and design thereof; provided, however, that number plates for non-commercial vehicles shall have the state motto 'live free or die' written thereon. The plates shall be kept clean."

New Hampshire RSA 262:27-c "Misuse of Plates"

"Any person who knowlingly attaches or permits to be attached to a motor vehicle a number plate assigned by the director or authority of any other jurisdiction, to another vehicle or who knowingly obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle or who knowingly and deliberately fails to display on a motor vehicle proper lights, as herein provided, or the number plates and the registration number duly issued therefor shall be guilty of a misdemeanor."

STATEMENT OF THE CASE

Since 1969, the State of New Hampshire has required that all number plates for noncommercial vehicles, with some exceptions, bear the state motto, "Live Free or Die." NHRSA 263:1. Under New Hampshire law, it is a misdemeanor knowingly to obscure, or to permit to be obscured, the figures or letters on State issued license plates. NHRSA 262:27-c. The New Hampshire Supreme Court has held that "letters" includes the words of the state motto.[1] The appellees, George and Maxine Maynard, are Jehovah's Witnesses. At the time this suit was commenced they owned two automobiles, a 1971 Toyota and a 1968 Plymouth.[2] The Maynards believe that the message conveyed by the state motto is

[1] *See, State v. Hoskin*, 112 N.H. 332, 295 A.2d 454 (1972).

[2] The Plymouth has been sold. The Toyota is registered in Mr. Maynard's name but the parties stipulated that both the Maynards are owners. Mrs. Maynard's name appears on the note financing the Toyota, her earnings were used to make the car payments and she derives as much use and benefit from the car as Mr. Maynard. (Tr. 5)

repugnant to their religious and political beliefs and refuse to display it on their automobiles.

Beginning in March or April, 1974, Mr. Maynard began covering the words "Live Free or Die" on the license plates of both cars with bright orange or red reflective tape. In May or June, 1974, because neighborhood children kept removing the tape, Mr. Maynard cut out of the license plates the words "Or Die" and covered the resulting hole, as well as the words "Live Free" with tape. (App. 15)*

On November 27, 1974, while driving the Toyota in Lebanon, New Hampshire, Mr. Maynard was issued a summons for obscuring letters on his license plates. The police officer removed the front plate from the car. On the same date, Mr. Maynard was charged by a Lebanon, New Hampshire District Court Complaint with a violation of RSA 262:27-c. The complaint charged that he "did allow the plates to be obscured in that the figures LIVE FREE OR DIE were covered over with a strip of red tape, and the figures OR DIE had been cut away from the plates." (App. 17-18) On December 6, 1974, Mr. Maynard appeared in Lebanon District Court, *pro se*, to answer the charge. He entered a plea of not guilty. He was advised by Judge Lovejoy of his right to counsel but told the court that he wished to represent himself. (App. 33) He then asked Judge Lovejoy for

*"App." refers to the Appendix. "App. Br." refers to the Appellants' Brief. "Tr." refers to the Transcript of the Hearing before the Three-Judge Court.

permission to tape record the proceedings, which request was granted.[3]

After Mr. Maynard explained that the slogan "Live Free or Die" was against his religious teaching and belief, Judge Lovejoy said that he was sworn to uphold the law as set forth by the legislature. (Transcript of Pl. Exh. 3, p. 4) He further explained that he, Judge Lovejoy, had had a similar case which had been appealed to the New Hampshire Supreme Court. Judge Lovejoy interpreted the supreme court's decision in *State v. Hoskin*, 112 N.H. 332, 295 A.2d 454 (1972) to mean that "anybody who tapes over those words, that motto, is, in fact violating the law." (*Id.* 5) After stating that he respected Mr. Maynard's right to worship God as he sees fit, (*Id.* 5) Judge Lovejoy imposed a fine of $25.00 which he suspended. According to Mr. Maynard, "I asked the judge after the sentence if I should make an appeal, and he said it wasn't necessary, because there was nothing to appeal." (App. 34)

On December 28, 1974, Mr. Maynard was charged with a second violation of RSA 262:27-c. Again the charge was that he had covered over the motto with tape and cut out the words "Or Die." (App. 19-20) He appeared in court to answer this charge on January 31,

[3] New Hampshire employs a two-tier system of trial courts. Most misdemeanors are prosecuted in district court with a right to appeal for a trial *de novo* in superior court. Trial by jury is unavailable in district court. Cases are generally prosecuted by a police officer. No official transcript is made. Mr. Maynard's partial tape recording of the proceedings is marked as Pl. Exh. 3. With the consent of the parties, this tape has been transcribed and is attached as an Appendix to this brief. The original has been filed with the Court.

1975.[4] He advised the court that he wished to represent himself (App. 36) and plead not guilty. He was found guilty by Judge Lovejoy and sentenced to pay a $50.00 fine. He was also sentenced to the Grafton County House of Correction for six months but this sentence was suspended. At the same time, Judge Lovejoy vacated the suspension of the fine from December 6, 1974 and ordered Mr. Maynard to pay it. (App. 19-20) Judge Lovejoy told him that if he disagreed with the finding he could make an appeal. (App. 35) After the judge left the courtroom, Mr. Maynard advised the clerk of the court that he could not pay the fines as a matter of conscience. Judge Lovejoy then returned to the bench and made the following finding:

> "1/31/75 – Respondent having refused to comply with the order of this court in the payment of a total fine of $75.00 and having advised the court that his refusal is one of conscience and not of inability to pay because of indigency, Respondent is therefore ordered committed to the Grafton County House of Correction pursuant to RSA 618:9 for 15 days. Stand committed." (App. 20)

[4]Mr. Maynard originally went to court on this charge on January 17, but the case was not heard. While he was in court, a police officer confiscated the remaining number plate on the Toyota. He asked the officer, "How am I going to get home?" The officer replied "That's your problem" and advised Maynard that if he tried to drive the car home, he would radio ahead and have him picked up. Mr. Maynard fashioned plates with his license number on them out of cardboard. In Plainfield, New Hampshire he was stopped by a state tropper and given a summons for violating RSA 262:27-c for failing to display his duly issued number plates. Mr. Maynard had to leave his car with friends and the trooper drove him home. (Tr. 18-19).

Mr. Maynard was taken immediately to the House of Correction where he served his full sentence. He was released on February 15, 1975.

Prior to trial on the second complaint, Mr. Maynard had been charged on January 3, 1975, with a third violation of RSA 262:27-c. (App. 21-22)[5] He was found guilty by Judge Lovejoy on January 31, 1975. This conviction was "continued for sentence."[6]

The present action was instituted on March 4, 1975[7] by Mr. and Mrs. Maynard to obtain a declaratory judgment that RSA 263:1 was unconstitutional on its face and as applied to them insofar as it required them to display the state motto on their license plates and that RSA 262:27-c, by making it a crime to obscure the state motto, violated the First and Fourteenth Amendments to the United States Constitution. The complaint also sought a Temporary Restraining Order and permanent injunctive relief to prevent the appellants from arresting or prosecuting the Maynards in the future for masking the state motto on their license

[5]This third prosecution was not known to counsel at the time the federal action was filed on March 4. The first that counsel learned about this conviction was on April 29, 1975, when the State sent a draft of a Stipulation of Facts with copies of three criminal complaints attached.

[6]The three-judge court held, based upon an explanation offered by counsel for the State at oral argument, that the disposition of "continued for sentence" is a final sentence in this context and that no collateral consequences attach unless the defendant is prosecuted again. *Maynard v. Wooley*, 406 F. Supp. 1381, 1384 (D.N.H. 1976). See App. 63-64. The appellants do not contest this ruling.

[7]The time for appealing any of the prior convictions had expired by this date. 406 F. Supp. at 1384 n.4.

plates.[8] The complaint did not seek to have Mr. Maynard's prior convictions vacated or his arrest records expunged.

On March 11, 1975, the district court (Bownes, J.) issued a Temporary Restraining Order enjoining the defendants (appellants here) (from making further arrests of the Maynards pending a decision of the merits. (App. 13) The court held that irreparable harm to the Maynards was shown by the facts that their objection to the motto was religiously based; that Mr. Maynard had been issued two summonses for misuse of plates and had served fifteen days in jail; that Mr. Maynard had been restricted in his ability to find work and that Mrs. Maynard would be unable to sell jewelry to bring in needed income for the family; that their license plates had been confiscated; and that in the absence of a temporary Restraining Order they would be subject to further criminal penalties. (App. 13).

The hearing on the merits took place on September 22, 1975.[9] During the hearing counsel stipulated that

[8]The appellants have never filed a responsive pleading to the complaint. On March 7, 1975, appellants Clarke and Doyon filed a Motion to Dismiss and a document styled "Objection to Motion for Temporary Restraining Order." The Motion to Dismiss was denied by Judge Bownes on March 11, 1975. (App. 13) The ramifications of this action with regard to the affirmative defense of collateral estoppel are discussed in Section II, *infra*.

[9]The long delay was occasioned by a request by the state that the court postpone the hearing on the merits pending consideration of a bill by the New Hampshire legislature that would have made inclusion of the motto on non-commercial license plates optional with the car owner. The legislation died in committee whereupon the evidentiary hearing was scheduled.

Mrs. Maynard shared her husband's religious views concerning the motto and that she was under a threat of prosecution. (App. 45), *Maynard v. Wooley*, 406 F. Supp. 1381, 1384 n.5 (D.N.H. 1976). On February 9, 1976, the district court entered its Opinion and Order declaring RSA 262:27-c unconstitutional as applied to the appellees. The court granted a permanent injunction against the defendant-appellants preventing them from arresting or prosecuting the Maynards for expressing their dissent from the state motto by taping it over. It is from this judgment that the individually named defendants have appealed.*

SUMMARY OF ARGUMENT

I.

The *Younger* doctrine** does not bar a federal civil rights action for declaratory and injunctive relief against threatened prosecutions even though the federal plaintiff did not appeal prior state court convictions. Principles of comity, equity and federalism are not affected when, at the time the federal suit was filed, no state prosecutions were pending, the relief sought was prospective only, and where no attempt was made to attack collaterally prior convictions. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), requiring the exhaustion of

*This Court's jurisdiction over this appeal under 28 U.S.C. Sec. 1253 is not affected by the repeal of §§2281 and 2282 of Title 28. Section 7 of S. 537 provides "This Act shall not apply to any action commenced on or before the date of the enactment." Cong. Rec. H. 8143 (Daily Ed. August 2, 1976).

**See, *Younger v. Harris*, 401 U.S. 37 (1971).

state remedies, is inapposite where the federal plaintiff does not attempt to substitute the lower federal courts for the state's appellate system. Assuming that the appellants prevail on their theory, the case must be remanded to the district court for a determination of whether it fits within the "extraordinary circumstances" exception to the *Younger* doctrine and whether Mr. Maynard deliberately by-passed state appellate remedies.

II.

Appellants' argument that the permanent injunction issued by the district court was barred by *Younger* was waived by failing to argue it in the lower court and by inadequately briefing it here. Since the *Younger* doctrine is not jurisdictional, but a judicial rule of limitation, the Court should not address this issue *sua sponte*.

Assuming that the issue is properly before the Court, it raises the issue of whether the doctrine of equitable restraint forbids the granting of a permanent injunction against threatened prosecutions in the absence of a showing of bad faith, harassment or other unusual circumstances. Historically, the Court has required only that the traditional standard of irreparable injury be shown to justify such relief. This Court's decision in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), holding that *Younger* does not govern the grant of preliminary injunctions, compels a like holding with respect to permanent injunctions against threatened prosecutions.

III.

Principles of *res judicata* and collateral estoppel do not bar the federal court from considering Mr. Maynard's constitutional claims under the circumstances of this case. In the first place, both affirmative defenses have been waived by the appellants: *Res judicata* by failing to plead it as an affirmative defense, F.R. Civ. P. 8(c), and collateral estoppel by failing to pursue it in the district court. Even if these defenses had been preserved, they were not included in the Questions Presented in appellants' Jurisdictional Statement and have not been adequately briefed. Assuming, *arguendo*, that the issue of collateral estoppel is properly before the Court, it cannot be applied to defeat Mr. Maynard's federal action where the constitutional issues were not actually litigated in the state court proceedings and where Mr. Maynard did not elect the state court as his forum.

IV.

Even if Mr. Maynard's action was barred by his failure to appeal his state court convictions, Mrs. Maynard, who was threatened with prosecution but against whom no prosecutions had been brought, is not precluded from seeking declaratory and injunctive relief. She has Article III standing to maintain such a suit and there is a continuing genuine controversy between her and the defendant-appellants. The principle that two distinct parties may be so closely related that they are both subject to the *Younger* considerations that bind either of them is inapplicable here. This is not a case where the *Younger* requirements could be circumvented

by "artificial niceties" and there was no privity between Mr. and Mrs. Maynard in the circumstances of this case that could deny her access to the federal court for vindication of her claims.

V.

In taping over the motto "Live Free or Die" on their license plates, the Maynards were engaged in symbolic expression protected by the First Amendment. Their action was closely akin to pure speech. They acted out of deep religious conviction and had the intent to convey a particularized message likely to be understood by those who viewed it. The interests advanced by the state for requiring the motto to be displayed on passenger license plates are insufficient to overcome the Maynards' First Amendment rights.

VI.

In addition to their right to express their opposition symbolically, the Maynards have a right protected by the First Amendment to be free from required affirmations of belief. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). They cannot be required to display on their private property an orthodoxy with which they disagree. Contrary to appellants' assertion, the test is not whether observers would impute endorsement of the motto to them. Rather, it is whether they regard the compelled dissemination of the message offensive to their personal convictions.

VII.

Because the Maynards' objection to the motto is based on their religious beliefs, the requirement that they display it on their private property violates the Free Exercise Clause of the First Amendment. The Free Exercise Clause prohibits the application of even neutral regulatory laws having secular aims if they infringe on an individual's religious beliefs. As applied to the Maynards, the enforcement of this law forces them either to follow their religious precepts and forfeit their right to drive or abandon the imperatives of their faith in order to be able to use their automobile. Our Constitution protects against this sort of Hobson's choice. *Sherbert v. Verner*, 374 U.S. 398 (1963).

When the Free Exercise Clause is implicated, the Court must balance the interests of the individual against those of the state. Not only must the state demonstrate a compelling need to intrude on the individual's religious beliefs, but also the individual should be aided by a presumption that the state can satisfy its needs by imposing a lesser burden on the individual. Whether or not a presumption is applied in this case, the state has not sustained its burden of proof.

ARGUMENT

I.

Principles of *Comity*, *Equity* and *Federalism* do not bar Mr. Maynard's federal action for declaratory and injunctive relief even though he did not appeal prior convictions where, at the time the federal suit was filed, there were no pending state prosecutions, the relief sought was prospective only, and no attempt was made to attack collaterally his state court convictions.

A. Introduction

The question brought before this Court by the Appellants is whether the principles of *Younger v. Harris*, 401 U.S. 37 (1971) preclude a federal action for declaratory and injunctive relief where the plaintiff has previously been prosecuted in the state courts and failed to appeal his convictions. Appellants also assert in their brief that the permanent injunctive relief granted by the district court "clearly constitutes the type of *federal interference* which Declaratory Judgment Act [sic] was intended to avoid." (App. Br. 9) While appellees believe that this second issue has not been properly preserved or briefed, it raises the issue left undecided in *Steffel v. Thompson*, 415 U.S. 452 (1974), of whether the doctrine of equitable restraint applies when permanent injunctive relief is sought against threatened prosecutions. To the extent that the *Younger* doctrine is jurisdictional, this Court would have to consider the issue *sua sponte*. But see *Sosna v. Iowa*, 419 U.S. 393, 397 n.3 (1975).

Assuming the Court reaches both arguments, analysis is aided by considering them separately. The issue presented by Appellants' Jurisdictional Statement is whether principles set forth in *Younger v. Harris, supra,* and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), require a federal court to abstain where the federal plaintiff has been convicted in a prior state court prosecution and, "despite the full opportunity to utilize state appellate remedies, has failed to do so."[10] If the appellants were to prevail on this issue, the judgment below granting both declaratory and injunctive relief would have to be reversed and it would be unnecessary to reach the narrower issue.

If the appellees prevail, however, the Court would address the second question, *viz.*, whether the permanent injunction granted by the three-judge court to restrain future threatened prosecutions was improper. Even if the Court were to hold that injunctive relief was barred by *Younger*, it would not affect the validity of the Declaratory Judgment. *Steffel v. Thompson, supra.*

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[10]The issue was first raised by Judge Gignoux in a letter to Judges Bownes and Chief Judge Coffin dated March 24, 1975. On March 26, 1975, Judge Bownes wrote to all counsel enclosing a copy of Judge Gignoux's letter and directed them to brief the issue of the applicability of *Huffman*.

B. The fact that Mr. Maynard did not appeal his prior state convictions does not require that his federal action be dismissed for failure to exhaust state appellate remedies where he does not collaterally attack his convictions.

1. A historical perspective

Prior to the Civil War, the federal courts played an insignificant role in enforcing federal constitutional guarantees against encroachment by state officials. In the wake of the war, however, the subject matter jurisdiction of the federal courts was greatly enlarged. Nationalism was triumphant and state agencies were not trusted to carry out the dictates of federal power. "Sensitiveness to states' rights, fear of rivalry with state courts and respect for state sentiment, were swept aside by the great impulse of national feeling born of the Civil War." Frankfurter and Landis, THE BUSINESS OF THE SUPREME COURT 64 (1928). With the enactment of the Civil Rights Act of 1871 and the establishment of federal question jurisdiction in 1875, Congress created two parallel judicial systems – state and federal – within which citizens could seek vindication of federal constitutional rights.

The effect of the post-Civil War jurisdictional legislation and the decision of this Court in *Ex Parte Young*, 209 U.S. 123 (1908) – permitting federal courts to grant injunctive relief against threatened enforcement of unconstitutional state laws – firmly established the federal courts as the primary forum for adjudicating claims that state actions violate the federal constitution. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U.L. Rev. 740, 848-857 (1974).

The availability of the federal courts as a forum for deciding these claims is tempered by the notion that "[s]ince the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit State courts to try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. 37 (1971). This principle developed out of deference to interests of comity, equity and federalism implicit in our system of dual sovereignties.[11]

The *Younger* line of cases may properly be understood as striking a balance between these competing interests so as not to deprive the plaintiff of a federal forum and not to intrude unduly on the ability of state courts to resolve federal issues. In any given case the tension between these competing policies must be resolved by carefully determining the impact of an assumption of federal court jurisdiction on the interests described above. Nevertheless, as Mr. Justice Brennan said in *Zwickler v. Koota*, 389 U.S. 241, 248 (1967), with reference to the post-Civil War Amendments:

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[11]These are distinct interests. "Comity" refers to the duty of respect owed by federal courts to state courts, arising from "the principle that state courts have the solemn responsibility, equally with the federal courts to guard, enforce, and protect every right guaranteed or secured by the Constitution . . .," *Steffel v. Thompson*, 415 U.S. at 460-61. Federalism is a broader concept, which requires the "National government . . . to vindicate and protect federal rights and federal interests . . . in ways that will not unduly interfere with the legitimate activities of the States." "Equity" implicates those general doctrines which, irrespective of comity and federalism, counsel judges not to grant injunctive relief when the moving party has an adequate remedy at law and will not suffer irreparable injury. *Younger v. Harris*, 401 U.S. at 43-44 (1971).

"In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . . .' *Robb v. Connolly*, 111 U.S. 624, 637. 'We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.' *Stapleton v. Mitchell*, 60 F. Supp. 51, 55; see *McNeese v. Board of Education*, 373 U.S. at 674 n.6. *Cf. Cohens v. Virginia*, 6 Wheat 264, 404."

2. The theory transformed into practice

In *Younger* itself, the Court held that in the absence of a finding of bad faith or other extraordinary circumstances, considerations of comity, equity and federalism preclude federal courts from enjoining a pending state criminal prosecution. In *Samuels v. Mackell*, 401 U.S. 66 (1971), decided the same day, the Court held that these same principles also prevented the granting of a declaratory judgment when a state criminal prosecution was under way. It is clear that the greatest interference with a State court's enforcement of the criminal laws is when a federal court literally snatches the case away from the court by cutting down the statute under which the defendant is charged.

Younger principles apply, therefore, in cases where the federal court is asked to intervene in *pending* state criminal prosecutions. *See, e.g. Kugler v. Helfant*, 421 U.S. 117 (1975); *Allee v. Medrano*, 416 U.S. 802, 817-18 (1974); *Roe v. Wade*, 410 U.S. 113, 126-27 (1973).

A corollary to this principle is that *Younger* applies only where the federal plaintiff seeks to attack his state court conviction. Thus, even where the state proceedings have ended, if the point of the federal suit is to nullify the effects of the state prosecution, federal equitable relief will be denied. *Huffman v. Pursue, Ltd., supra; Hicks v. Miranda*, 422 U.S. 332 (1975).

Finally, the Court has paid deference to the state judicial system by interpreting the concept of "pending" to include situations where the state proceedings are commenced after the federal suit has been filed but before any proceedings of substance have taken place. *Hicks v. Miranda, supra.*

Different principles apply where the purpose of the federal suit is not to nullify state court proceedings, but rather to secure an advance judicial determination of liability. In *Steffel v. Thompson, supra*, that Court addressed the question of whether declaratory relief is precluded when a state prosecution has been threatened but has not yet been brought, and a showing of bad faith enforcement or other unusual circumstances has not been made. The Court held that the relevant principles of equity, comity and federalism "have little vitality" in the absence of a pending state proceeding. *Steffel v. Thompson*, 415 U.S. at 462. With respect to federal declaratory relief the Court said:

> "When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal

proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding. *Cf. Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965)." *Steffel v. Thompson*, 415 U.S., at 462.[12]

3. None of the state interests implicated in the Younger doctrine are present here.

In light of the above stated principles, it is clear that *Younger* is not applicable to the instant case. All parties concede, and the district court found, that no prosecutions were pending against the appellees at the time they sought relief in federal court against future arrests. *Maynard v. Wooley*, 406 F. Supp. at 1384 n.4. None were brought after the federal suit was commenced. *Cf. Hicks v. Miranda, supra.* The suit did not challenge past convictions. It is clearly governed by *Steffel v. Thompson, supra.*

[12]The Court did not decide whether the same reasoning would apply where the federal court is asked to *enjoin* the threatened prosecutions. *Id.* 463 & n.12.

Nevertheless, appellants contend that Mr. Maynard is barred from seeking declaratory or injunctive relief under the Civil Rights Act of 1871 by his failure to appeal any of his three state court convictions. They argue that Mr. Maynard deliberately eschewed a federal declaratory judgment action and "elected" criminal prosecution. His failure to appeal his convictions, in their view, acted as a waiver of his Congressionally granted right to a federal forum thereby triggering *Younger.* Shifting from his conduct to the effect of federal intervention, appellants assert that

> "The action of the District Court [intervention and injunctive relief] effectively nullified the prior state criminal proceedings against appellee Mr. Maynard, condoned his engaging in conduct which the criminal laws of the State of New Hampshire prohibit and infringed upon the sovereign state derived authority of the appellants to administer and enforce the laws as substantive as those constituting the motor vehicle registration system of the State of New Hampshire." App. Br. 13[13]

Primary reliance is placed by the appellants on *Huffman v. Pursue, Ltd., supra.* But *Huffman* held only that after state judicial proceedings have been initiated, the respondent in those proceedings cannot avoid the bar of *Younger* by bypassing state appellate remedies and seeking relief in federal court that would nullify the judgment of the state court. *See, e.g., Huffman v. Pursue, Ltd.*, 420 U.S. at 609; *Sartin v. Commissioner*

[13]This argument taken in its entirety, seems to be an amalgam of *Younger, res judicata* principles and the propriety of a federal court's issuing injunctions against threatened prosecutions. It is literally impossible to discern which argument goes with what theory. Appellees have attempted to delineate the theories and treat each one separately.

of Public Safety, 535 F.2d 430 (8th Cir. 1976). To have held otherwise would permit litigants to substitute the federal court for the state appellate courts, precisely the evil that *Younger* was intended to avoid. The Court also held, not surprisingly, that the rule could not be avoided by deliberately letting the time for appealing the state judgment run. 420 U.S. at 611 n.22.[14]

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[14]*See also Ellis v. Dyson*, 421 U.S. 426 (1975). After being convicted and fined in Municipal Court, on pleas of *nolo contendere*, for violating the Dallas, Texas loitering ordinance, petitioners, rather than seeking a trial *de novo* in County Court which would have exposed them to a larger fine, brought suit in federal court for a declaratory judgment that the ordinance was unconstitutional. Petitioners also sought an injunction to expunge their records of arrests and convictions but sought no injunctive relief to protect them from future prosecutions.

The district court had dismissed the case believing erroneously that *Younger* applies to suits seeking declaratory relief against future prosecutions. In reversing, this Court noted that the district court had no reason "to inquire into the relationship between the past prosecution and the threat of prosecutions for similar activity in the future." *Id.* at 433. Because there was a question as to whether a case or controversy still existed, the Court remanded without considering "such questions as the interaction between the past prosecution and the threat of future prosecutions, and of the potential considerations, in the context of the case, of the *Younger* doctrine, of *res judicata*, of the plea of *nolo contendere*, and the petitioners' failure to utilize the state appellate remedy available to them." *Id.* at 435. The dissenting Justices would have reached the question of "whether a plaintiff may resort to §1983 to attack collaterally his state criminal conviction when he has either knowingly pleaded guilty to the charge or failed to invoke state appellate remedies." *Id.* at 439 (Mr. Justice Powell, dissenting).

Justices White, Powell, Stewart and the Chief Justice would have resolved this issue against the petitioners. 421 U.S. at 437 *et seq.* It is significant that even the dissenting justices did not suggest that plaintiffs' request for *declaratory relief* would be barred by their failure to utilize state appellate remedies.

Appellants would broaden the exhaustion doctrine far beyond the parameters of *Huffman v. Pursue, Ltd.* The rule they propose is that any time a person has had the opportunity to vindicate his constitutional rights in state judicial proceedings (i.e., as a defendant in a criminal prosecution) he would be barred by *Younger* from seeking relief from future prosecutions under the Civil Rights Act. (App. Br. 9-10). Such a doctrine has no justification when examined in light of the state's interests of equity, comity and federalism.

Appellants claim that federal intervention "effectively nullifies" the prior state criminal proceedings against Mr. Maynard. In fact, since Mr. Maynard did not ask that his arrest records be expunged, it has no effect whatsoever on his prior convictions. *See, e.g., Ellis v. Dyson, supra; Preiser v. Rodriguez*, 411 U.S. 475 (1973). Indeed, having arrested and successfully prosecuted Mr. Maynard, New Hampshire vindicated any comity interest which it might advance in connection with the only prosecutions in which Mr. Maynard was involved. To the extent that appellees sought relief from future arrests, this in no way infringed upon any interest of New Hampshire. *See Steffel v. Thompson, supra.*

Appellants also contend that the federal court's action (1) condoned conduct prohibited by New Hampshire law and (2) infringed upon the authority of the appellants, derived from the sovereign, to administer and enforce the motor vehicle registration laws. But the mere fact that a federal court holds state action unconstitutional does not involve a slight to the state's judiciary: Congress expressly gave the federal courts that power in the Civil Rights Act. Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 Harv. L. Rev. 1352, 1360-61 (1970). In fact, this Court has expressly

protected the right of litigants to present their federal constitutional claims in the federal forum even where it is necessary to resolve questions of state law by a prior submission to the state courts. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). *Pullman* type abstention "does not . . . involve the abdication of federal jurisdiction, but only the postponement of its exercise." *Id.* 416. The appellants' theory would restrict the availability, and not just the timing, of the federal forum.

Finally, the appellants argue that since there was "no evidence that the New Hampshire state courts are unable to protect his [Mr. Maynard's] constitutional rights, the exhaustion of state judicial remedies becomes preferable if not mandatory." This argument boils down to the claim that abstention is required simply to give the state courts the first opportunity to vindicate the federal claim. This notion has consistently been rejected by this Court. *See, e.g., Wisconsin v. Constantineau*, 400 U.S. 433, 437-39 (1971); *Zwickler v. Koota*, 389 U.S. 241 (1967); *Harman v. Forssenius*, 380 U.S. 528, 534-36 (1965); *Monroe v. Pape*, 365 U.S. 167 (1961).[15] Only a direct interference with a criminal prosecution or an attack on the judgment will implicate interests of equity, comity and federalism requiring federal court

[15]In their brief the appellants purport to distinguish *Zwickler v. Koota, supra*, on the ground that there "the challenged state statute was not susceptible to a narrowing state court construction." (App. Br. 10) Appellees do not understand the appellants to argue that this case is appropriate for *Pullman* type abstention. In fact, the New Hampshire Supreme Court's decision in *State v. Hoskin, supra*, removes the possibility of a narrowing state court construction of the statute that would avoid constitutional questions.

abstention.[16] *Cf. Preiser v. Rodriguez*, 411 U.S. at 490-91; *Florida State Board of Dentistry v. Mack*, 401 U.S. 960, 961 (1971) (Burger, C. J. and White, J., dissenting from denial of *certiorari*); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

C. Issues requiring a remand if the appellants prevail on their argument.

Assuming, *arguendo*, that the Court holds *Younger* applicable where no collateral attack is made on a state conviction, the case would have to be remanded to the district court for determination of two questions. The first is whether the facts bring the case within the "extraordinary circumstances" exception of *Younger*. The second is whether Mr. Maynard deliberately bypassed state appellate remedies.

1. This case comes within the "extraordinary circumstances" exception to the *Younger* doctrine because threat against the federal rights sought to be protected could not be eliminated by defending against a single state prosecution.

Even if there had been a pending prosecution, *Younger* would not have barred Mr. Maynard's federal

[16]Appellants argue that the federal court intervention "... has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws. *Huffman*, 420 U.S. at 605." This partially quoted language from *Huffman* was in the context of discussing the applicability of *Younger* to a civil procedure designed to help the state enforce its criminal obscenity statutes.

action. He was faced with irreparable injury in the sense that the threat against his federally protected rights was one that could not be eliminated by defending against a single criminal prosecution. *Younger v. Harris*, 401 U.S. at 46. Mr. Maynard was being subjected to a series of repeated prosecutions for actions required by his religious beliefs. His choices were to abjure his religious beliefs, give up his ability to earn a living, or to leave the state. The irreparable injury was both "great and immediate."

Moreover, New Hampshire's two-tier system of trial courts does not afford "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). First, the Maynards desperately needed temporary injunctive relief so that they could operate their automobiles while the merits of their claims were being litigated. The criminal appellate system offered no procedural mechanism for doing this. Second, a transfer of questions direct to the New Hampshire Supreme Court from the trial court would have been inadequate due to the absence of a transcript. This Court has often indicated that questions of constitutional dimension frequently turn in the final analysis on questions of fact. *Oregon v. Mitchell*, 400 U.S. 112, 246 (1970) (Brennan, J., dissenting). Under these circumstances the injury to Mr. Maynard was far beyond the mere "cost, anxiety and inconvenience of having to defend against a single criminal prosecution." 401 U.S. at 46.

2. If the failure to exhaust state appellate remedies does trigger *Younger* where prior convictions are not collaterally attacked, the case would have to be remanded to the district court for fact finding on the question of whether Mr. Maynard deliberately by-passed state appellate remedies.

Assuming that appellants' theory has any credence, it is apparently predicated on the assumption that Mr. Maynard deliberately by-passed the state appellate process. Thus, on page 7 of their brief, appellants claim that ". . . during the course of each trial Mr. Maynard elected neither to request the reservation and transfer of constitutional issues directly to the New Hampshire Supreme Court nor to appeal his convictions to the superior court."[17]

In neither of Mr. Maynard's court appearances on December 6, 1974 or January 31, 1975 was he represented by an attorney. At the conclusion of his first trial his sentence was suspended so there was no reason to appeal. At the conclusion of his second trial he was taken to jail immediately. Mr. Maynard, a layman with a ninth grade education, (App. 37) should not be chargeable with notice of the complexities of transferring questions to the Supreme Court or filing

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[17]The argument also seems to be based on the premise, rejected by the three-judge court, that Mr. Maynard actually litigated the constitutional issues in the Lebanon District Court. (App. Br. 9); *Maynard v. Wooley*, 406 F. Supp. at 1385 n.6. (*obiter dictum*)

appeals.[18] In any event, the lower court had no occasion to make findings of fact on this issue. Should it become necessary, the appropriate course would be to remand it to the district court. See *Ellis v. Dyson, supra.*

D. The doctrine of equitable restraint does not bar a federal court from granting a permanent injunction against threatened prosecutions.

The district court in *Maynard v. Wooley, supra,* observed that "[d]efendants do not dispute that the *Younger* doctrine permits federal injunctive relief against threatened arrests and prosecutions." 406 F. Supp. at 1385. Indeed, the only issue advanced by the

[18]New Hampshire law provides that a defendant may appeal to the Superior Court for a trial *de novo* at the time sentence is declared in the district court. The appeal must be entered by the next return day unless the time is extended by the Superior Court for good cause shown. NHRSA 599:1. If the defendant fails to take an appeal, then within 3 days of the date sentence is declared, a written petition may be filed with the district court for permission to enter a late appeal. NHRSA 599:1-a. The petition shall be granted provided the appellant or his attorney appears at the next court session to post bail. NHRSA 599:1-a. A person prevented from taking an appeal "through mistake, accident or misfortune, and not from his own neglect," has 30 days to petition the Superior Court after sentence is declared for permission to appeal. NHRSA 599:1-b. The granting of such appeals is discretionary with the court. NHRSA 599:1-b. An appeal bond must be posted in an amount not to exceed $2,000 as determined by the Court. NHRSA 599:2. The effect of the appeal is to vacate the judgment and transfer the case to Superior Court for a trial *de novo. See State v. Green*, 105 N.H. 260, 197 A.2d 204 (1964). Questions of law may also be transferred directly to the New Hampshire Supreme Court from either the district or superior court but only if the presiding justice thinks fit. NHRSA 502-A:17-a; NHRSA 491:17.

appellants below was that the failure of Mr. Maynard to appeal his state court convictions barred him from seeking relief of any kind in the federal courts under *Younger v. Harris, supra,* and *Huffman v. Pursue, Ltd., supra.* Nevertheless, woven into the appellants' brief is the argument that by granting permanent injunctive relief, the district court frustrated principles of equity, comity and federalism (Summary of Argument, App. Br. 5). Threads of this argument also appear on pages 9 and 13 of Appellants' brief. The issue has been waived in the district court and inadequately briefed here. Sup. Ct. Rules 40(1)(d)(2); 40(5). Moreover, unless it can be said to be fairly comprised within the questions presented by the appellants in their Jurisdictional Statement, it is not properly before this Court. These obstacles can only be overcome if the *Younger* issue is jurisdictional and therefore cognizable by the Court *sua sponte. Philbrook v. Glodgett* 421 U.S. 707, 721 (1975).

The essence of jurisdiction is the power to affect legal relations. The power of federal courts to adjudicate controversies is defined by Art. III of the Federal Constitution and the statutes enacted by Congress to permit them to hear certain types of cases. The Court's power to hear the instant case is found in 28 U.S.C. §1343. Congress has enacted a statutory bar to the jurisdiction of federal courts to issue injunctions to stay proceedings in state courts. 28 U.S.C. §2283. However, suits brought under 42 U.S.C. §1983 are exempt from this enjoinder. *Mitchum v. Foster,* 407 U.S. 225 (1972). *Younger* itself makes clear that the rule enunciated in that case was a judicial doctrine of limitation going to the propriety, and not the power, of Federal injunctive relief. 401 U.S. at 43. *See, e.g., Huffman v. Pursue, Ltd.,* 420 U.S. at 613 n.1 (Mr.

Justice Brennan, dissenting); *Douglas v. Jeannette*, 319 U.S. 157, 162 (1943); *McCune v. Frank*, 521 F.2d 1152, 1157 n.15 (2d Cir. 1975). Accordingly, this issue should be treated as waived.

Assuming the issue is properly before the Court, it poses the question expressly left undecided in *Steffel v. Thompson, supra,* and *Allee v. Medrano*, 416 U.S. at 820 n.15, *viz.*, do *Younger* principles restrict the granting of permanent injunctive relief against threatened prosecutions?

In addition to a declaratory judgment, the appellees' complaint requested preliminary and permanent injunctive relief against threatened prosecutions.[19] After hearing on March 7, 1975, Judge Bownes issued a Temporary Restraining Order granting the preliminary relief requested by the Maynards. This was clearly proper. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

In conjunction with its declaratory judgment that RSA 262:27-c was unconstitutional as applied to the Maynards, the three-judge court issued a permanent injunction. The court enjoined the defendants from arresting or prosecuting the plaintiffs at any time for covering over the state motto. Although the court believed that the state could easily issue the plaintiffs license plates that did not contain the motto, it

[19]Appellees requested a preliminary injunction that the defendants be restrained from arresting or prosecuting them if they covered over the state motto on their new (1975) plates. Alternatively, they sought an injunction to prevent defendants from confiscating their number plates in the event they were issued more summonses during the pendency of the litigation. The complaint also sought permanent injunctive relief against the Commissioner of Motor Vehicles to require him to issue them number plates without the state motto in the event they prevailed on the merits. It further requested that the preliminary injunction be made permanent. (App. 9-10).

declined to make such an order out of deference to the State. The court explained that the relief ordered should fully protect the plaintiffs in the exercise of their First Amendment rights without any further interference with the operation of New Hampshire's system of vehicle identification.

Despite this Court's adherence to the maxim that federal courts should be slow to act "where its powers are invoked to interfere by injunction with threatened criminal proceedings", *Douglas v. Jeannette*, 319 U.S. at 162, historically the rule has been honored more in the breach than in the observance. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U.L. Rev. 740 (1974). The most that can be said is that in different epochs the Court has applied the traditional standard of irreparable injury with greater or lesser elasticity. *Id.*; Note, 72 Colum. L. Rev. 874 (1972). In *Younger v. Harris, supra,* the Court referred to six cases involving threatened prosecutions where the Court had failed to find irreparable injury.[20] These cases do not signal the creation of a new standard of irreparability but simply underscore the point that intrusions into state criminal proceedings are never to be taken lightly. In fact, the Court pointed out that in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), a seminal case regarding federal court injunctions against threatened criminal prosecutions in the First Amendment area, the plaintiffs had alleged a basis for equitable relief under "long-established standards." *Younger v. Harris*, 401 U.S. at 50.

[20]*Fenner v. Boykin*, 271 U.S. 240 (1926); *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935); *Beal v. Missouri Pacific Railroad Co.*, 312 U.S. 45 (1941); *Watson v. Buck*, 313 U.S. 387 (1941); *Williams v. Miller*, 317 U.S. 599 (1942); *Douglas v. Jeannette*, 319 U.S. 157 (1943).

Plainly, different interests are implicated when a federal court is asked to grant injunctive relief against threatened, as opposed to pending, state prosecutions. Note, 45 S. Cal. L. Rev. 847, 869-70 (1972); Note, 72 Colum. L. Rev., *op cit.* at 892-93. Even though irreparable injury is still necessary for injunctive relief, it should not be of the same magnitude as that required for intervention in pending actions. *Lake Carriers Association v. MacMullan*, 406 U.S. 498 (1972), decided after *Younger*, removes any doubt that in the absence of a pending prosecution, permanent injunctive relief is proper whenever the plaintiff meets the usual standard of irreparable injury. Note, 48 N.Y.U.L. Rev. 965, 975-79 (1973).

In *Doran v. Salem Inn, supra*, the Court held that the grant of a preliminary injunction by a federal court is not subject to *Younger* restrictions where no criminal prosecution had been brought at the time the injunction issued. After reaffirming the right of the litigants to challenge the constitutionality of state statutes in federal court, the Court summarized the reasons for its holding that the plaintiff's claim for a preliminary injunction should be considered without regard to *Younger.* These included the facts that (1) no state proceedings were pending against the plaintiffs at the time the district court issued its preliminary injunction; (2) there was no question that they satisfied the requirements of federal jurisdiction; (3) ordinarily the practical effect of injunctive and declaratory relief will be virtually identical; (4) prior to final judgment there is no established declaratory remedy comparable to a preliminary injunction and that unless preliminary injunctive relief is available, plaintiffs in some situations may suffer unnecessary and substantial irreparable harm and (5) "neither declaratory nor injunctive relief can

directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs and the state is free to prosecute others who may violate the statute." *Id.* at 931.

With one exception, the policy reasons discussed in *Doran* are equally applicable to the permanent injunction sought in the instant case. First, the injunction issued by the district court did not interfere with any on-going state criminal proceedings. The decree was not directed at state prosecutors or state judges and enjoined the defendants only from arresting the plaintiffs or instituting prosecutions against them. *Allee v. Medrano*, 416 U.S. at 817 n.11. Second, no state proceedings were pending against the Maynards at the time the court issued its injunction. Third, the Court's observation that the practical effect of injunctive relief will be virtually identical to declaratory relief is equally applicable to permanent injunctions. Obviously, there may be instances where injunctive relief will be more abrasive, but this is not such a case. The fact than an injunction would subject the defendants to the contempt power if they violate the court's order is not different whether preliminary or permanent injunctive relief is sought. Fourth, it is true that during the preliminary stages of litigation there is no alternative to a preliminary injunction if litigants are to be protected against irreparable injury.[21] Furthermore, when a declaratory judgment is entered, the

[21] In fact, Judge Bownes issued a Temporary Restraining Order so that the Maynards could drive their cars without fear of arrest pending resolution of the case on the merits. If he had not done so, the Maynards would have been without transportation from March 1975 when the complaint was filed until February 1976 when the case was decided.

"stronger" injunctive "medicine" may be unnecessary. However, this is a matter that should be left to the sound discretion of federal judges applying the traditional standard of irreparable harm.[22]

Finally, a permanent injunction, where a statute is held unconstitutional as applied to the plaintiffs, only interferes with the enforcement of the statute with respect to the particular plaintiffs, and the state is free to prosecute others who may violate the statute. *See Steffel v. Thompson*, 415 U.S. at 474.

The appellants argue that permanent injunctive relief constitutes the type of interference which the Declaratory Judgment Act was intended to avoid. (App. Br. 9) However, when Congress empowered the federal courts to grant the new remedy of the Declaratory Judgment in 1934, it was "without expanding or reducing the subject matter jurisdiction of the federal courts, or in any way diminishing the continued vitality of *Ex parte Young* with respect to federal injunctions." *Perez v. Ledesma*, 401 U.S. 82, 111 (1971) (Opinion of Mr. Justice Brennan). *See Lake Carriers Association v. MacMullan*, 406 U.S. at 509-510.

When a federal court issues a permanent injunction against an ongoing state prosecution, the impact on the state court system is dramatic. This drastic interference with the state judiciary arguably justifies the rigorous standard of "bad faith" and harassment that must be met. Even though concerns of federalism are not limited to suits seeking to enjoin criminal prosecutions

[22]In *Doran*, this Court characterized the traditional standard as "stringent" and pointed out that even a preliminary injunction "seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*." Federal Judges can be expected to give this ample consideration before granting permanent injunctions.

in progress, that is the area in which principles of federalism are entitled to "their greatest weight." *Rizzo v. Goode*, 423 U.S. 362, 380 (1976). Federal courts should continue to have discretion to grant injunctions against threatened prosecutions using the traditional standard of irreparable harm at least where the statute is held unconstitutional as applied.

The issue before an appellate court is whether the issuance of the injunction in light of the applicable standard constitutes an abuse of discretion. *Doran v. Salem Inn, Inc., supra.* No abuse of discretion is claimed by the appellants in their brief. In any event, the injunction issued by the three-judge court was exceedingly narrow. It was in the context of repeated prosecutions having been brought against Mr. Maynard for conduct which he believed was compelled by his religious beliefs. Mr. Maynard's dilemma could not be resolved by defending against a single prosecution. Mrs. Maynard, too, was threatened with prosecution. Preliminary injunctive relief had already been granted on evidence that enforcement of the law against the Maynards had threatened their livelihood. Mr. Maynard had spent fifteen days in jail as the result of his prior convictions. The court did not, by its injunction, thrust itself into the internal affairs of the Department of Motor Vehicles. Rather, in framing its order, the court specifically declined to require the State to provide the Maynards with plates free of the motto so as to minimize interference with the system of vehicle registration. Under the circumstances, there was no abuse of discretion.

II.

Principles of *res judicata* and collateral estoppel do not bar the federal court from considering the appellees' constitutional claims.

A. Introduction

The appellants contend that the doctrines of *res judicata* and collateral estoppel barred the district court from adjudicating the appellees' claims because Mr. Maynard failed to utilize the State's appellate machinery. (App. Br. 9) Assuming, *arguendo*, that the appellants had properly preserved these issues, neither doctrine would be applicable in the circumstances of this case.

B. The appellants failed to raise the affirmative defense of *res judicata* in the lower court and thereby waived it.

Affirmative defenses must be raised by a responsive pleading at the trial level.[23] F.R.Civ.P. 8(c). *Res judicata* is an affirmative defense. On March 7, 1975, prior to the designation of a three-judge court, the appellants filed a motion to dismiss in which they raised the defense of collateral estoppel. (App. 11). This motion did not raise the defense of *res judicata*. No

[23]Although Rule 8(c), F.R.Civ.P. specifies that the defense must be raised in a responsive pleading, it is now generally recognized that it may be made by motion. 2A J. Moore, *Federal Practice*, ¶8.28 at 1863 (2d ed. 1975); 5 C. Wright & A. Miller, *Federal Practice & Procedure* §1277 (1969).

answer was ever filed and the issue of *res judicata* was never presented to the three-judge court, either in the extensive brief filed by the appellants or in oral argument. While the term *res judicata* is sometimes used in its generic sense to include collateral estoppel,[24] the converse is not true. The failure of the appellants to raise *res judicata* in their motion to dismiss constitutes a waiver. F.R.Civ.P. 8(c); *Huffman v. Pursue, Ltd.*, 420 U.S. at 607 n.19 (1975).

C. The affirmative defense of collateral estoppel was waived by the appellants' failure to pursue it before the three-judge court and by their failure to include it in their Statement of Questions Presented in their Jurisdictional Statement.

As indicated above, the affirmative defense of collateral estoppel was raised by the appellants' Motion to Dismiss dated March 7, 1975. (App. 11) On March 11, 1975, after hearing, Judge Bownes issued a Temporary Restraining Order and denied the Motion to

[24]*Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 n.6 (1955); *Mastracchio v. Ricci*, 498 F.2d 1257, 1259 n.1 (1st Cir. 1974); *Palma v. Powers*, 295 F. Supp. 924, 932 n.1 (N.D. Ill. 1969).

Dismiss.[25] The appellants never renewed their claims of collateral estoppel before the three-judge court. Their extensive brief filed September 1, 1975, did not list it as one of the "Issues Presented." Nor did the appellants allude to the issue of collateral estoppel during oral argument on September 22, 1975. Only in exceptional circumstances, not present here, does this Court review a question not properly raised in the court below. *Eastlake v. Forest City Enterprises, Inc.*, ___ U.S. ___, 49 L.Ed.2d 132, 136 nn.2,3 (1976); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957).

Moreover, the appellants have not included collateral estoppel as an issue for review in their Jurisdictional Statement filed in this Court. Supreme Court Rules 15(1)(c). There are no exceptional circumstances in this case that should lead the Court to depart from its

[25]28 U.S.C. §2284 states, *inter alia*, that a single judge shall not "hear and determine" a motion to dismiss the action in a case required to be heard by a three-judge court. Judge Bownes denied the State's motion to dismiss before the three-judge court was convened. It is unclear whether the single judge under these circumstances has power to determine the validity of an affirmative defense. To the extent that it would affect the ability of the three-judge court to fashion relief it may be permissible. *ACLU of Maryland v. Board of Public Works*, 357 F. Supp. 877, 883, (D. Md. 1972). Even assuming the single judge should have reserved the collateral estoppel issue for consideration by the full court, the appellants waived any possible argument that Judge Bownes acted improperly. 28 U.S.C. §2284 (5) specifically provides that the action of the single judge shall be reviewable by the full court at any time before final hearing. Alternatively, the appellants could have appealed the action to the U.S. Court of Appeals for the First Circuit before the three-judge court was convened. *See, e.g., Hicks v. Pleasure House, Inc.*, 404 U.S. 1 (1971); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962). They failed to do this.

consistent practice of declining to review questions that are not included in the Jurisdictional Statement. *See, e.g., Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 386 n.12 (1960); *Irvine v. California*, 347 U.S. 128, 129 (1954); *General Talking Pictures Co. v. Western Electric Co.*, 304 U.S. 175, 177-79 (1938). *See also Aldinger v. Howard*, U.S. ___, 49 L.Ed.2d 276, 280 n.3 (1976); *Flint Ridge Development Co. v. Scenic Rivers Association*, ___ U.S. ___, 49 L.Ed.2d 205, 214 n.6 (1976); *Eastlake v. Forest City Enterprises, Inc.*, 49 L.Ed.2d at 140 n.11. R. Stern & E. Gressman, SUPREME COURT PRACTICE, ¶6.37 at p. 297; ¶7.15 at 352 (4th ed. 1969).

Nor is collateral estoppel a "subsidiary question fairly comprised" within the issue presented for review. Supreme Court Rule 40(1)(d)(1). The question appealed by the appellants is "whether federal intervention in a state criminal proceeding is precluded where the defendant has had a full opportunity to utilize state appellate remedies and has failed to do so." (App. Br. 2). The *Younger* doctrine concerns itself with the relationship between the state and federal courts and problems of comity, etc., that arise where a federal court is asked to inject itself into an ongoing effort by the state to enforce its criminal laws. This is the issue raised and discussed by the appellants in their Jurisdictional Statement, in which they cited *Huffman v. Pursue, Ltd., supra*, and *Kugler v. Helfant, supra*.

Collateral estoppel, on the other hand, addresses the question of whether a thorough and determinative consideration of the same issue in a previous action, whether appealed or not, bars reconsideration in a subsequent suit between the same parties. While considerations of comity may be involved, its primary purpose is to avoid repetitious trials, end litigation,

make a final determination of controversies and avoid conflicting adjudications between the same parties. These issues are separate and distinct from those raised by *Younger* and its progeny.

Briefs in the Supreme Court may not raise additional questions or change the substance of the questions already presented in the Jurisdictional Statement. Supreme Court Rules 40(1)(d)(2). Appellants should not be permitted to resurrect this abandoned affirmative defense at this stage of the proceedings.

Finally, the question of whether collateral estoppel (issue preclusion) is applicable in cases brought under 42 U.S.C. §1983 is one which has never been considered by this Court. *Ellis v. Dyson*, 421 U.S. 426, 440 n.6 (1975); *Preiser v. Rodriguez, supra; Florida State Board of Dentistry v. Mack, supra* (*res judicata*). Resolution of that question presents difficult questions that deserve careful and thorough treatment. Except for citing two cases, *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972) *cert. denied* 410 U.S. 930 (1973) and *Mastracchio v. Ricci*, 498 F.2d 1257 (1st Cir. 1974) *cert. denied* 420 U.S. 909 (1975), appellants have failed to brief their argument. Inadequate briefing is cause for the Court to refuse to consider the issue sought to be raised. *See, e.g., Philbrook v. Glodgett*, 421 U.S. at 721; Supreme Court Rules 40(1)(g); 40(2) & (5).[26]

[26]The three-judge court stated, *obiter dictum*, that even if the collateral estoppel argument had been made, it would have been rejected. *Maynard v. Wooley*, 406 F. Supp. at 1381, 1385 n.6.

D. Assuming that the issue of collateral estoppel is properly before the Court, that doctrine does not act as a bar to federal declaratory and injunctive relief in the circumstances presented by this case.

1. Introduction

The lower federal courts have adopted widely varying approaches to the question of whether principles of *res judicata* and collateral estoppel are applicable in the context of suits commenced under section 1983. Some have suggested that application of the doctrines would make the Civil Rights Act a "dead letter." *Ney v. California*, 439 F.2d 1285, 1288 (9th Cir. 1971). Others have considered the availability of habeas corpus to obtain a federal forum decisive in satisfying the Congressional concerns underlying the Civil Rights Act.[27] *See, e.g., Moran v. Mitchell*, 354 F. Supp. 86, 88-89 (E.D. Va. 1973). Still others have argued that there is greater justification for application of the preclusion rule where a guilty plea has been entered in a previous criminal trial. *Metros v. U.S. District Court for District of Colorado*, 441 F.2d 313, 316-317 (10th Cir. 1971). Crucial questions may turn on whether the prior case was civil in which the federal plaintiff voluntarily appeared, *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972) *cert. denied*, 410 U.S. 930 (1973) or criminal, in which he lacked any choice in the matter.

[27]At the time Mr. Maynard filed his action under section 1983, habeas corpus was no longer available to him. In any event, since his primary concern was relief against future prosecutions, habeas corpus was not an appropriate remedy.

Palma v. Powers, 295 F. Supp. 924 (N.D. Ill. 1969). *See* Dorsen, Bender & Neuborne, *Political and Civil Rights in the United States*, 4th ed. vol. 1 at 1376-77 (Law School ed. 1976); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 Va. L. Rev. 250 (1974); Vestal, *State Court Judgment as Preclusive in Section 1983: Litigation in Federal Court*, 27 Okla. L. Rev. 185 (1974); Comment, *The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions*, 1975 Ill. Law Forum 95 (1975); Note, 53 Va. L. Rev. 1360 (1967). The issues do not lend themselves to a "bright line" rule. Each situation must be given separate consideration.

Even assuming that section 1983 suits are not entitled to greater immunity than ordinary cases, surely they are not entitled to less. This is particularly true in the context of criminal convictions.

> "While considerations of state-federal comity and judicial efficiency may dictate that a civil rights action be dismissed when the alleged deprivation has been examined fully during a state criminal trial or has been waived by the complainant, the simple fact of an unreversed state conviction cannot by itself require dismissal." *Mulligan v. Schlachter*, 389 F.2d 231, 233 (6th Cir. 1968).

Accord, Wecht v. Marsteller, 363 F. Supp. 1183, 1190 (W.D. Pa. 1973); *Kauffman v. Moss*, 420 F.2d 1270, 1273 (3rd Cir. 1970) *cert. denied*, 400 U.S. 846 (1970). *Cf. Ney v. California, supra; Moran v. Mitchell*, 354 F. Supp. 86 (E.D. Va. 1973); *Ames v. Vavreck*, 356 F. Supp. 931 (D. Minn. 1973).

This case does not require the Court to determine the broad question of whether collateral estoppel[28] applies at all in section 1983 actions. Assuming, *arguendo*, that it does, the doctrine would not bar Mr. Maynard's action on the instant facts.

The First Circuit has applied the rule that in the criminal context, collateral estoppel bars only issues actually litigated. *Compare Mastracchio v. Ricci, supra*, with *Lovely v. Laliberte*, 498 F.2d 1261 (1st Cir. 1974) (*res judicata*).[29] Apparently, the appellants do not quarrel with the legal principles articulated by the Court in *Ricci*, but rather contend that Mr. Maynard actually "raised and litigated" his constitutional claims in the state court. The proper course is to examine "the

[28]As pointed out above, *res judicata* (or claim preclusion) was waived. If the present case were on the same cause of action, it would not be necessary to consider the effect of collateral estoppel which applies only where the second suit is on a different cause of action. Since Mr. Maynard was prosecuted both for masking the motto and cutting out the words OR DIE, and for the further reason that his convictions were for offenses committed on specific dates which are not in issue here, it seems clear that this case involves a different cause of action. In any event, appellees proceed on that assumption for purposes of this argument.

[29]*Emich Motors v. General Motors Corp.*, 340 U.S. 558, 568-69 (1951); *Cromwell v. County of Sac*, 94 U.S. 351 (1876). The Court need not determine whether a federal court should apply federal principles of collateral estoppel or the doctrine as it is applied by the state in which the court sits. See 28 U.S.C. §1738. New Hampshire applies the rule that a party is collaterally estopped only as to issues actually litigated and not as to issues which might have been litigated in the state court action. *Ainsworth v. Claremont*, 108 N.H. 55, 226 A.2d 867 (1967); *McGrath v. McGrath*, 109 N.H. 312, 251 A.2d 336 (1969); *Archie v. Piaggio & Co.*, 109 N.H. 162, 245 A.2d 76 (1968).

record of the antecedent criminal case to determine the issues decided by that judgment." *Cardillo v. Zyla*, 486 F.2d 473, 475 (1st Cir. 1973). Reasonable doubt as to what was decided in the prior case must be resolved against using it as an estoppel. *Kauffman v. Moss*, 420 F.2d 1270, 1274 (3rd Cir.) *cert. denied*, 400 U.S. 846 (1970). The courts have held that there can be no collateral estoppel where a certified copy of the transcript from the prior proceedings is lacking. *Basista v. Weir*, 340 F.2d 74, 81-82 (3rd Cir. 1965); *Kauffman v. Moss*, 420 F.2d at 1274; *Williams v. Liberty*, 461 F.2d 325 (7th Cir. 1972); *Cf. Ames v. Vavreck*, 356 F. Supp. at 941.

2. The constitutional issues presented in Mr. Maynard's federal civil rights action were not actually litigated in the state misdemeanor proceedings.

The record of Mr. Maynard's state court appearances is totally deficient in this respect: it is impossible to say that any constitutional issues were actually litigated. *Sartin v. Commissioner of Public Safety*, 535 F.2d 430, 433 n.4 (8th Cir. 1976) (issues of fact). At the first hearing on December 6, 1974, Mr. Maynard made his own tape recording of the proceedings. He explained to the judge as best he could that it offended his religious beliefs to have the state motto on the licenses plates affixed to his cars. He also made a fleeting reference to freedom of speech. (Transcript of Exh. 3, p. 5) No reference whatsoever was made to symbolic speech or a right to be free from a required affirmation or belief. No reference was made to the legal standards to be applied when such claims are made. The judge advised Mr. Maynard that under *State v. Hoskin* anyone "who tapes over the motto is, in fact, violating the law."

Since, as appellants point out on page 13 of their brief, *Hoskin* did not consider the issue of symbolic speech, it is impossible to conclude that the state judge resolved that issue against him. Nor can Mr. Maynard be faulted for failing to appeal this conviction in view of the fact that his sentence was suspended. As meager as this record is, it surpasses that of Mr. Maynard's second trial on January 31.

On this record, as the three-judge court recognized *obiter dictum*, "the constitutionality of the state statute was not litigated by Mr. Maynard in the state misdemeanor proceedings . . ." *Maynard v. Wooley*, 406 F. Supp. at 1385 n.6; *Accord, Jackson v. Official Rep. and Employees of Los Angeles Police Department*, 487 F.2d 885, 886 (9th Cir. 1973). The effect was the same as if Mr. Maynard had stood "mute" throughout the trial. *See* Note, 88 Harv. L. Rev. 453, 462 (1974). *Compare, Thistlethwaite v. City of New York*, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974) and *Reich v. Freeport*, 527 F.2d 666, 671 & n.11 (7th Cir. 1975) *with Lombard v. Board of Education*, 502 F.2d 631 (2d Cir. 1974).

3. Mr. Maynard did not "elect" the state court as his forum.

Section 1983 embodies a strong federal policy of assuring litigants the option of a federal forum to seek redress for asserted constitutional wrongs committed under color of state law. *Monroe v. Pape*, 365 U.S. 167 (1961). Whatever the implications where persons voluntarily bring suit in state court, *see Bricker v. Crane, supra*, to apply collateral estoppel to deny a full federal hearing to those who cannot be considered to have elected to litigate their federal claims in state

court would defeat the policy underlying section 1983. *See generally*, Note, 88 Harv. L. Rev. 453, 460 (1974); *England v. Louisiana State Board of Medical Examiners*, 375 U.S. at 419.

Appellants make the astonishing claim that, by his conduct, Mr. Maynard deliberately opted against a federal action for declaratory relief and "elected" instead criminal prosecution in the state courts. (App. Br. 10). There is no evidence that Mr. Maynard had ever heard of the Civil Rights Act of 1871 much less that he deliberately decided against a federal remedy. To accept this theory would impute knowledge of federal procedure, which few lawyers understood, to a layman. To suppose that Mr. Maynard consciously chose to be prosecuted, appeared in court without counsel, and refused to pay the accumulated fines knowing it meant separation from his family and imprisonment carries its own refutation. Mr. Maynard's unsophisticated attempt to explain the religious basis for his actions to the judge can in no way be interpreted as a decision on his part to litigate his federal constitutional claims in the state courts. An explanation of one's religious beliefs should not be confused with the presentation of a legal theory to excuse one's conduct from the operation of the criminal laws. *See Thistlethwaite v. City of New York*, 497 F.2d at 342.

III.

Even if Mr. Maynard is barred from seeking relief in the federal court, Mrs. Maynard, who was under the threat of prosecution but against whom no prosecution was brought, may maintain a suit for declaratory and injunctive relief.

Appellants contend that Mrs. Maynard's action must be dismissed because she failed to prove a *prima facie* case under 42 U.S.C. §1983. They claim that if she had sought relief under the Declaratory Judgment Act, 28 U.S.C. §2201, her threshold burden would have been to demonstrate a continuing actual controversy. "Since she failed to request such relief," the theory goes, she was required to "show that the appellants had subjected her to the deprivation of her First Amendment right to freedom of speech." (App. Br. 14) Based upon this perceived distinction, the appellants "do not address herein the issue of whether a genuine controversy exists between Mrs. Maynard and the Appellants." *Id.* 15.

Appellants' argument betrays total confusion regarding the nature of this case. Plaintiffs' complaint sought "declaratory and injunctive relief under 42 U.S.C. §1983." (App. 5) Jurisdiction was based on 28 U.S.C. §1343. Since the Declaratory Judgment Act was not jurisdictional, it was not necessary to designate it by statutory citation in the complaint. *Younger v. Harris*, 401 U.S. at 41 n.2; F.R.Civ.P. 8(a).

Appellants cite no source for their unique theory concerning declaratory judgments brought under 42 U.S.C. §1983. None exists. There is no requirement, statutory or otherwise, that in order to obtain declaratory relief Mrs. Maynard would have to demonstrate that the appellants had clearly subjected her to a

deprivation of First Amendment rights. Moreover, this argument was not made in the district court.

Since appellants have not briefed the issue of whether a genuine controversy exists, it is only necessary to point out that the requirements of Article III of the United States Constitution were met. The standard is whether the plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged statute or official conduct. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Where a prosecution has been threatened the continuing existence of a live and acute controversy must be shown. *Steffel v. Thompson*, 415 U.S. at 459.

Mrs. Maynard is a Jehovah's Witness and shares her husband's religious beliefs. (Transcript of TRO hearing, March 7, 1975, at 25; App. 45). She was a co-owner of the automobiles in question. (App. 14). The plaintiffs stipulated that Mrs. Maynard would testify that she "permitted to be obscured these words on the license plates on the car of which she is co-owner." (App. 46). The state stipulated with respect to both Mr. and Mrs. Maynard that if they do not comply with the laws of the State, there is a threat of prosecution. (App. 24-25) *Maynard v. Wooley*, 406 F. Supp. at 1384 n.5. Mrs. Maynard used the car in her business selling jewelry. She applied for commercial plates and accompanied her husband to the Department of Motor Vehicles in an attempt to obtain plates without the motto. (App. Br. 36). Her husband had been prosecuted and convicted three times for violating RSA 262:27-c and had been jailed for fifteen days because he refused to pay the fines. There was plainly a justiciable controversy between Mrs. Maynard and the appellants. *Compare Steffel v. Thompson*, 415 U.S. 452 (1974) and *Doe v. Bolton*, 410 U.S. 179, 188 (1973) *with Boyle v. Landry*, 401 U.S. 77 (1971) and *Younger v. Harris*, 401 U.S. at 42.

Appellants contend in the alternative that Mrs. Maynard's action is barred by the principle that legally distinct parties may be so closely related that they are all subject to the *Younger* considerations which govern any one of them. *Doran v. Salem Inn, Inc., supra*, relied on by the appellants, suggested that such a situation might be presented where plaintiffs are brother-sister corporations related "in terms of ownership, control and management." *Id.* 928. Although the appellants claim support in the record for the proposition that "Mrs. Maynard's religious actions and beliefs are strongly influenced by her husband", (App. Br. 15), a perusal of the transcript reveals none. In any event the district court held that

> "Here, however, each of the Maynards is acting on his own or her own independently held religious precepts. There is no suggestion that either controls the actions or beliefs of the other." *Id.* 1385.

This is not a case where the requirements of *Younger* could be circumvented by "artificial niceties." *Allee v. Medrano*, 416 U.S. at 833. Nor is this a case where Mrs. Maynard has sought to bring a federal action at the same time that her husband is a defendant in a state prosecution. 416 U.S. at 830 n.6. Thus, even if it were held that Mr. Maynard is barred from federal court by his failure to exhaust state appellate remedies, a federal declaratory judgment obtained by Mrs. Maynard would not interfere with any past state prosecutions against her husband.

In *Hicks v. Miranda, supra*, the state had commenced its prosecution of the theatre employees before the federal action was filed. The Court observed that Miranda's interests obviously were intertwined with those of his employees; Miranda's lawyers represented

the employees and the federal action sought to interfere with the pending state prosecution. In view of those facts, the court indicated that *Younger* should apply unless it were clearly shown that Miranda could not seek the return of his property in the state proceedings or see to it that his federal claims were presented there. Thus, the Court seems to have had a 3 pronged standard in mind: "(1) Would the federal relief prayed for interfere with the state proceedings? (2) Is there privity in the *res judicata* sense between the federal plaintiff and the state defendant? (3) Is it possible for the federal plaintiff to obtain complete relief in the state proceedings?" Note, *The Supreme Court, 1974 Term*. 89 Harv. L. Rev. 47, 159-160 (1975).

A federal declaratory judgment for Mrs. Maynard would not interfere with any past state proceedings against her husband. With respect to the second question, one commentator has suggested the following standard:

> "In determining whether a nonparty's interest in litigating an issue identical to one litigated in a previous action is more or less compelling, the crucial element is the extent to which the nonparty may be thought to have had a vicarious day in court. Two aspects of this question can be identified. First, to what extent did the nonparty participate in or control the prior action; second, to what extent can the issue be said to have been fully and fairly litigated in the first action in a manner which protects the interests of the nonparty." Note, *Collateral Estoppel of Non Parties*, 87 Harv. L. Rev. 1485, 1499-1500 (1974).

The record in this case contains no evidence that Mrs. Maynard participated in or controlled her husband's state court defenses. Second, the little evidence available regarding the presentation and consideration of Mr. Maynard's defense in the state

court can lead to only one conclusion: that the claims which Mrs. Maynard advanced in her federal declaratory judgment action were not fairly presented or passed upon in state court.

Finally, it was not possible for Mrs. Maynard to obtain relief in the prior state proceedings. Even assuming that a prosecution had been pending aganst Mr. Maynard at the time the federal action was filed, it is obvious that she would not be permitted to intervene in his criminal defense. Furthermore, it is crucial to recognize that Mr. Maynard did not have the assistance of counsel at his trials thus creating a wholly different situation than *Hicks* or *Doran*. Mr. Maynard's failure to appeal his state convictions could have no effect on Mrs. Maynard's federal action to protect herself from future threatened prosecutions.

The supreme irony of appellants' argument is their declaration that "it is highly doubtful that Mrs. Maynard would have instituted federal litigation" but for her husband's "religious convictions and criminal conduct." The appellants have previously argued that Mr. Maynard was at fault for "electing" to be prosecuted in state court rather than bringing a federal declaratory judgment action before his arrests. Mrs. Maynard sought to do precisely what the state criticizes her husband for not doing: seek a declaration of her rights before she too was arrested. It is clear that if Mrs. Maynard had been arrested and convicted for violating this law, she would have gone to jail in her own right. Under these circumstances, it would violate due process if her federal declaratory judgment action were barred by her husband's prior convictions. *See Steffel v. Thompson, supra.*

IV.

The Maynards' conduct in taping over the words "Live Free or Die" on their license plates is symbolic speech protected by the First Amendment which outweighs any asserted state interests advanced by the appellants in this case.

A. Introduction

The State of New Hampshire requires most passenger cars to display the State motto "Live Free or Die" on their license plates. The Maynards are conscientiously opposed to that message. The issue presented by this case is whether the State's requirement is unconstitutional as applied to them. This inquiry examines first, whether their conduct can be regarded as symbolic speech within the protection of the First Amendment, and second, whether upon this record, the interests advanced by the State are substantial enough to justify infringement of constitutional rights.

In determining whether the Maynards' conduct in taping over the State motto on their license plates and exhibiting these plates was symbolic speech, the district court applied the principles set forth in *Tinker v. DesMoines Independent School District*, 393 U.S. 503 (1969), and *Spence v. Washington*, 418 U.S. 405 (1974). Having found the elements of symbolic expression present, the court then applied the four part test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), to determine whether the State's interests in displaying the motto on non-commercial plates were sufficient to restrict the Maynards' freedom of expression. The court found that the government regulation failed the third and fourth requirements set out in *O'Brien* in that the regulation was directly

related to the suppression of free expression and that the motto was not required for purposes of identification, noting that other means were available to the State to preserve its interests in facilitating vehicle identification.

In considering the competing claims advanced by the parties, the presence of certain additional factors which this Court deemed important in *Spence v. Washington, supra*, should be noted. First, title and possession of the license plates are vested in the owners. In a technical property sense they are not the property of the government even though the latter retains control over their use and disposition. Second, the Maynards are required to affix the plates to their private property. Third, the Maynards engaged in no disorderly conduct or activity likely to result in a breach of the peace. Fourth, they do not ask for permission to mutilate or destroy their license plates but only to put removable tape over a non-functional part of the plate.[30] Finally, this is not a case that may be analyzed in terms of reasonable time, place or manner restraints on access to a public area. *See Virginia Pharmacy Board v. Virginia Consumer Council*, ___ U.S. ___, 48 L.Ed.2d 346, 363-64 (1976).

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[30]The Maynards first taped over the motto on their license plates in March or April 1974. Subsequently, Mr. Maynard cut out the words "Or Die" from the plates and covered the remainder of the slogan, as well as the resulting hole, with tape. The appellants make much of this in their brief. (App. Br. 25) In March 1975, after Mr. Maynard's release from jail and at about the time the federal court suit was filed, the Maynards were issued new registration plates. Mr. Maynard placed reflective tape over the mottos. (See Exh. 8) He did not, at that time, nor has he since, cut out any part of the motto as he did on the 1974 plates. (App. 28-29).

B. Symbolic Speech

Symbolic speech is nonverbal communicative conduct or expression intended to espouse an idea or express a certain viewpoint. The threshold inquiry is whether the particular activity engaged in by the Maynards is entitled to the protection of the First Amendment. This determination is made by objectively viewing "the nature of their activity, combined with the factual context and environment in which it was undertaken"; a standard requiring the "intent to convey a particularized message" and, from the surrounding circumstances, a "likelihood . . . that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. at 410-411.[31] The district court found that these elements were satisfied because (1) in using red reflective tape to cover the motto the appellees clearly intended to call attention to the fact that they deliberately obscured it because they disagreed with it, and (2) appellees' message was likely to be readily understood by other New Hampshire citizens.

[31]The following criteria have been considered helpful in defining the symbolic conduct. "First, the conduct should be assertive in nature. This will generally mean that the conduct is a departure from the actor's normal activities and cannot adequately be explained unless a desire to communicate is presumed. Second, the actor must have reason to expect that his audience will recognize his conduct as communication. Third, communicative value does not depend on whether the idea sought to be expressed can be verbalized. The symbolism or medium may be an idea in itself." Note. 68 Colum. L. Review 1091, 1117 (1968) quoted in *United States ex rel. Radich v. Criminal Court of New York*, 385 F. Supp. 165, 173 n.33 (S.D.N.Y. 1974).

It should not require extended discussion to establish that the motto "Live Free or Die" holds "obvious political and philosophical significance for many." *Maynard v. Wooley*, 406 F. Supp. at 1386 n.10. It is a different species from slogans such as "Famous Potatoes" or "Sportsman's Paradise" or "Seat Belts Fastened?" which adorn license plates in other states. (App. Br. 27) Such slogans do not promote a particular point of view or compel any given orthodoxy. They are ideologically neutral. *See Katz v. Department of Motor Vehicles*, 32 Cal. App. 3d 679, 685-86, 108 Cal. Rptr. 424, 428 (1973). "Live Free or Die," on the other hand, is not a neutral statement but is practically a call to arms. Whatever it may mean to others, it is contrary to the Maynards' Christian training and belief. (App. 25-26)[32]

Appellants argue that *Tinker* and *Spence* are inapposite because the conduct involved in those cases derived communicative quality from the Vietnam War. (App. Br. 26) They claim that in the case at bar, the Maynards' conduct is directed at an object having symbolic significance far less than that of the flag. They assert that the meaning of "Live Free or Die" is ambiguous and that *a fortiori* no "particularized message" could be conveyed by covering it. Finally, they suggest that the meaning of a symbolic act must be apparent at the time it is made and that the

[32]The Maynards believe in God's Kingdom. To them life is more precious than freedom. They would rather live in bondage than give up their lives for freedom. (App. 28) Mr. Maynard testified that, "By taping it over [the Motto], I have made a public declaration of my faith for my salvation." (App. 26) He testified that if he would give up his life for a political system he "would be giving up the hope of everlasting life." (App. 27) "If I give my life to the State or encourage other people to do it, would the State give it back to me? No. But God will. So, therefore, I will not support that slogan." (App. 28)

intended meaning cannot be explained by the testimony of the actor at his trial. (App. Br. 26)

While the existence of a war may be significant in providing a backdrop for an act of symbolic speech, it goes primarily to the question of whether the message is likely to be understood, and not to whether the actor intended to convey a message. Here, where the State has required many of its citizens to display a politically loaded slogan on their private property, there can be no doubt that the act of covering that slogan over with bright red tape is designed to convey opposition to it.[33] As George Maynard testified, the bright reflective red tape was effective in bringing attention to what they were doing. (App. 29)

Appellants contend that the phrase "Live Free or Die" is ambiguous and therefore no particularized message could be conveyed by covering it. Yet the dominant message conveyed is that political freedom is the greatest good and that it is better to die than to live under tyrannical rule. Covering over this motto when it is required to be displayed is a clear statement that one disagrees with it.

Appellants say that "but for the *post facto* courtroom explanation by Mr. Maynard of his conduct,

[33]The Maynards' activity is more plainly symbolic expression conveying a particularized message than the conduct of Mary Beth Tinker in wearing a black armband to protest the war, or Harold Spence in affixing a peace sign to his flag. This is because unlike these cases, the Maynards' conduct derives its meaning from the State motto itself. By covering the words "Live Free or Die" the Maynards are engaging in activity that is closely akin to pure speech. *Tinker v. DesMoines Independent School District*, 393 U.S. 503 (1969). Obviously if the statute as applied to the Maynards fails to meet the *O'Brien* test it would necessarily be unconstitutional if their activity is viewed as pure speech. *Goguen v. Smith*, 471 F.2d 88, 100 n.18 (1st Cir. 1972), *aff'd on other grounds*, 415 U.S. 566 (1974); *Radich*, 385 F. Supp. at 174 n.34.

his conduct in fact would be pure whimsey." (App. Br. 26)[34] To the extent that this suggests that an act of symbolic speech cannot be explained by testimony at trial, it is frivolous. This Court has frequently emphasized the importance of such testimony. *Spence v. Washington, supra; Cohen v. California*, 403 U.S. 15, 16 (1971); *see Smith v. Goguen*, 415 U.S. 566, 592-93 (1974) (Mr. Justice Rehnquist, dissenting). If the appellants' argument is intended as an indirect assualt on Mr. Maynard's sincerity, that issue was resolved in Maynard's favor in the lower court.[35]

It cannot be doubted that in taping over the motto, the Maynards intended to make a particularized statement of their strong opposition to the credo "Live Free or Die." The real thrust of the appellants' argument is that even if the Maynards had such an intent, their action was not capable of being understood by those who viewed it. They base this argument on the assumption that there is no "general universal interpretation" of "Live Free or Die" and no issue of

[34]Even without his testimony it would be obvious that deepfelt feelings motivated Mr. Maynard: Not many individuals would choose jail over payment of fines which he deemed utterly incompatible with his religious beliefs. *West Virginia Board of Education v. Barnette*, 319 U.S. at 643 (Black and Douglas, JJ, concurring).

[35]Appellants sought to show that Mr. Maynard had been disfellowshipped and that other Jehovah's Witnesses do not object to the motto. (App. 40-42) The court believed Mr. Maynard to be sincere in his belief. The truth or falsity of an individual's religious beliefs as opposed to the sincerity of the individual believer, is no concern of the court's. *United States v. Ballard*, 322 U.S. 78, 86-88 (1944). Nor is it material that the Maynards' views are not shared by any or all of their co-religionists. *Biklen v. Board of Education*, 333 F. Supp. 902, 905-906 (N.D.N.Y. 1971) *aff'd.* 406 U.S. 951 (1972).

great public moment to infuse it with meaning. This cramped interpretation would eviscerate the doctrine of symbolic speech.

The Maynards' conduct was not undertaken in a vacuum. In New Hampshire, controversy over the motto has raged for years. In *State v. Hoskin, supra,* the New Hampshire Supreme Court upheld the convictions of two people who objected to having the motto on their license plates. The hearing before the three-judge court in this very case was delayed for eight months while the New Hampshire General Court considered a bill that would have made inclusion of the motto on license plates optional with the car owner. (Docket entries 16, 17.) It is not likely that observers seeing the Maynards' bright tape would fail to get the message. *Maynard v. Wooley,* 406 F. Supp. at 1387 n. 11.

In *Tinker* and *Spence,* this Court stressed the importance of the context in which a symbol is used because wearing a black armband or putting a trident enclosed in a circle on a flag has no intrinsic significance. The war gave that conduct meaning. It is self-evident that when one covers over an explicitly worded slogan, the display of which is known to be required by the State, people will understand that the actor finds the slogan offensive.[36] In this connection, Mr. Maynard testified that the reason he used reflective tape was because of its effectiveness in drawing attention to his act:

[36]If the State required license plates to bear the words "Support Abortions" or "Amnesty Now" there would be no difficulty in understanding the opposition of someone who taped it over.

> "A. The reason for it is that people will recognize what I am doing, which is very effective. A lot of people stop me. And one person says 'You can't do that. That's against the law.' I says 'Fortunately, I was given permission by the Federal Court in a temporary injunction against the State.' And here I was able to converse with him and express my beliefs and my reason for doing so. And so, therefore, I was able to bear witness to the truth of God's Kingdom." (App. 29)

As the flag cases make clear, the fact that the primary symbol may mean many things to different people does not mean that symbolic expression cannot take place. No one would know by looking at his flag that Spence was protesting the Kent State tragedy and the Cambodian incursion as well as the war in general. But a person who saw his flag could not "miss the drift"[37] of his point and might be inspired to talk with him and gain a deeper understanding of what his symbolic protest was about.

The Maynards' actions are not simply one form of speech – their actions are the most effective form of expression they could choose. Through the simple act of taping over the motto with brilliant red tape, they are able to convey their message even to other motorists driving by at 55 mph. That act employs the same medium and reaches the same audience that the State does in promulgating its message. It has an impact that the Maynards could not achieve via more conventional forms of expression. Velvel, *Freedom of Speech and the Draft Card Burning Cases,* 16 Kan. L. Rev. 149, 153 (1968). Mr. Maynard testified that although there were other avenues of expression open to him, such as giving a speech, they were not as "positive" as the means chosen. (App. 39) Because of

[37]*Spence v. Washington,* 418 U.S. at 410.

his ninth grade education he is handicapped in his writing ability. (App. 37). However, he is conversant in sign language. His testimony at trial demonstrates his natural inclination to think in terms of symbols and to convey his thoughts by means of symbolic speech. (App. 36-39)

Finally, the environment in which the Maynards engaged in their expressive conduct (the highway) was not a public area where the state necessarily has some power to restrict expressive activity because of strong countervailing interests. *Cline v. Rockingham County Superior Court*, 502 F.2d 789, 791 (1st Cir. 1974).

C. The Interests of the State of New Hampshire

The appellants advance two categories of state interests which, they claim, are promoted by the requirement that New Hampshire passenger cars display license plates bearing the words "Live Free or Die": (1) promoting appreciation of history, state pride, individualism and tourism; and (2) facilitating vehicle identification. In considering whether these interests are sufficiently substantial to override the Maynards' First Amendment rights, it is important to recognize that the issue presented by this case is not whether a state can enforce a statute making it unlawful to deface a motor vehicle registration plate. It is, rather, whether a state can require license plates to bear a slogan with political or ideological meaning and forbid individuals, to whom the plates are issued, from covering the slogan even though they may vigorously disagree with it. It must be clear that the interests that the state advances will actually be compromised unless punitive action is taken

in the case at hand. *Spence v. Washington, supra; Cline v. Rockingham County Superior Court, supra; United States ex rel. Radich v. Criminal Court of New York*, 385 F. Supp. 165 (S.D.N.Y. 1974).

1. The State's interest in promoting pride, appreciation of history, individualism and tourism.

This Court has held that if the interest advanced by the State is not unrelated to the suppression of free speech, then the four-part test[38] set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) is inapplicable. *Spence v. Washington*, 418 U.S. at 414 n.8; Note, 8 Loyola L. Rev. (L.A.) 689, 706-707 and n.81 (1975). Under such circumstances, the balancing test applied when pure speech is involved, is triggered. *Id.*

It is apparent that the governmental interests in promoting pride and associated interests attempting to influence attitudes, are directly related to the suppression of free expression. By requiring the placement of the motto on license plates and prosecuting those who obscure the motto as an expression of their dissent, the State ensures the widest possible dissemination of the message contained therein. Since the government's interest is to prevent individuals from interfering with the transmission of the State sponsored message through the medium of symbolic expression, it

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[38] "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* 377.

is not "unrelated to the suppression of free speech." *See* Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. 29, 56-57 (1973).

Thus, even if the State's interests in promoting pride, etcetera are valid, the *O'Brien* test is inapplicable. If First Amendment balancing is undertaken, the appellants' concession that these interests can be served by alternative means is dispositive. The State's interests cannot be of "compelling" importance under those circumstances.

Even if this Court were to find that these asserted interests are unrelated to the suppression of free speech, they would still fail to meet the other three elements of the *O'Brien* test. First, it is not the business of government to attempt to shape public opinion nor to seek to instill certain beliefs in the minds of individuals. "Authority here is to be controlled by public opinion, not public opinion by authority." *West Virginia Board of Education v. Barnette*, 319 U.S. at 641. Indoctrination and propagandizing of political views are outside the power of government in a free society. Thus, it is beyond the constitutional power of government to require that a particular nationalistic or political message be displayed by a citizen just as it is beyond the power of government to require a person to own a flag or to salute it. *Spence v. Washington*, 418 U.S. at 422; *West Virginia Board of Education v. Barnette*, 319 U.S. at 642.[39]

[39]The government can require all dwellings in a city to display a number identifying the address of the building. *Quaere*, could the state require every dwelling house to display a plaque with the legend "Live Free or Die" or "In God We Trust" together with the numerals?

Second, even if it may be argued that placing the motto on license plates furthers the interests of creating state pride, identity and individualism, it does not necessarily follow that these interests are advanced by punishing dissenters. If anything, such State interests are promoted by allowing freedom of expression. It is paradoxical for the State to argue that the motto is placed on license plates to foster individualism and at the same time claim the right to punish those who act as individuals.

The State's argument that having the motto on the license plates furthers its interest in promoting tourism is particularly thin. Its reliance on *Froslid v. Hults*, 248 N.Y.S.2d 676, 20 A.D.2d 498, *appeal dismissed*, 14 N.Y.2d 722, 250 N.Y.S.2d 68, 199 N.E.2d 166 (1964), is misplaced. While it can be argued that putting "World's Fair" on the State's license plates might induce people to visit the State, "Live Free or Die" is a totally different kind of message. This claim would only make sense if the plates said "Old Man in the Mountain" or something similar having tourist appeal. Moreover, the New York World's Fair, although operated by a private corporation, was for the public good. All revenues from the fair which remained after its obligations were discharged went to the city for restoration and improvement of Flushing Meadow Park and the remaining balance was to be used by the city

for educational purposes. *Id.* at 679.[40] In any event, there is no evidence in the record that including the motto actually promotes tourism or that preventing the Maynards from taping over the motto would decrease tourism.

With respect to the fourth element of the *O'Brien* test, appellants concede that it is possible for the State of New Hampshire:

> "to foster appreciation of State history and tradition by massive educational efforts, to create state pride, identity and individualism by holding patriotic oriented events, and to promote state tourism by the expenditure of additional monies for customary promotional advertising." (App. Br. 24)

Appellants argue, however, that their burden is met by showing only that their interests cannot be served as efficiently as they are by the means which they have chosen. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 at 1484-85 (1975). With all deference to Professor Ely, nothing in *O'Brien* suggests that the Court was employing a diluted version of the "less restrictive alternative" test. In fact,

[40]Aside from these factual differences, there are important legal distinctions as well. *Froslid* did not involve any claims based on the First Amendment. Central to the court's decision was its view that driving is a privilege, not a right, and that since the state could deny the privilege altogether, it "may prescribe conditions under which it shall be exercised." 248 N.Y.S.2d at 681. In the instant case such a theory would amount to conditioning access to public highways upon the advertising of a prescribed sentiment. This a state may not do, just as it may not condition attendance at school upon saluting the flag and reciting the pledge of allegiance. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943); *Sherbert v. Verner*, 374 U.S. at 404-405 & n.6.

the Court stressed that the non-possession regulations, which were offered as an alternative, protect "overlapping but not identical governmental interests" and "reach a different class of wrongdoers." *United States v. O'Brien*, 391 U.S. at 380. The Court could perceive no alternative means that would "more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction." *Id.* 381.[41]

In this case, as the district court held, there are alternatives available to the State which could "more precisely and narrowly" assure the preservation of its interests. *Maynard v. Wooley*, 406 F. Supp. at 1388. If the State wants to use a slogan calculated to raise strong emotions, it must be prepared to accommodate individuals who strongly disagree with it.

2. The State's interest in facilitating motor vehicle identification and law enforcement.

The appellees recognize that the State has a valid governmental interest in creating a system of motor vehicle identification. However, that interest is not furthered, either on its face or as applied to the Maynards, by requiring the State motto to be displayed

[41]The lower courts have not read *O'Brien* as creating a different standard of the less restrictive alternative test. *See, e.g., James v. Board of Education*, 461 F.2d 566, 574 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972); *A Quaker Action Group v. Morton*, 460 F.2d 854, 860 (D.C. Cir. 1971); *Nolan v. Fitzpatrick*, 451 F.2d 545, 548 (1st Cir. 1971); *United States v. Chalk*, 441 F.2d 1277, 1280-81 (4th Cir.), *cert. denied*, 404 U.S. 943 (1971); *Eisner v. Stamford Board of Education*, 440 F.2d 803, 806 (2d Cir. 1971); *Nixon v. Administrator of General Services*, 408 F. Supp. 321, 368 (D.D.C. 1976); *Doe v. Martin*, 404 F. Supp. 753, 759 (D.D.C. 1975).

on passenger cars. Unlike the numerals and the words "New Hampshire," the State motto is non-functional. This is apparent from the facts (1) that at various times in the past, different slogans have adorned the State's license plates (App. Br. 16) and (2) that even now, many of the State's plates do not bear the motto. (App. 66) The State concedes that "it is possible for the State of New Hampshire to establish a workable motor vehicle registration system without utilizing the state motto on license plates, . . ." (App. Br. 24) The requirement that the letters of the motto shall not be obscured does not further any important or substantial governmental interest. In fact, the State's argument is something of a self-fulfilling prophesy: The motto is important to the motor vehicle system only because it is a part of the plate design.

Even if it is assumed that the second element of the *O'Brien* test is facially valid, the record in this case demonstrates that identification of the Maynards' vehicle is not impaired by taping over the motto. Lebanon Police Chief Neil Wooley testified that with tape across the motto he cannot tell whether a non-commercial vehicle has proper plates on it or whether, in fact, someone has made a so-called "screwdriver transfer" of other plates (e.g. trailer plates) to a vehicle. (App. 56-57) However, Frederick Clarke, the State Commissioner of Motor Vehicles, testified that only non-commercial, so-called passenger, vehicles have plates like the Maynards' containing two letters and three numbers. Thus, Clarke testified that the taping of the motto on the type of plate issued to the Maynards does not impair identification of the vehicle.

(App. 53)[42] As found by the court below, the State failed to prove that any other non-passenger motor vehicle has the same license plate number as the Maynards'. *Maynard v. Wooley*, 406 F. Supp. at 1388 n.13. In any event, it is apparent that the State's interest in identification could best be served by applying the words "passenger" or "non-commercial" instead of the politically charged motto "Live Free or Die."

Appellants would sustain the State's interest under the third element of the *O'Brien* test by analogizing the legal requirement of 31 U.S.C. §324-a that our National Motto – "In God We Trust" – appear on all coins and currency. Appellants contend that just as obscuring the national motto would tend to defeat the establishment of a uniform national monetary system, obscuring the state motto on license plates defeats the establishment of a uniform state motor vehicle registration system.

This analogy fails because coins and currency bearing the motto "In God We Trust" are not items that must be prominently displayed on private property. Currency

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[42]Chief Wooley stated that "without the words (the motto) or some distinguishing marks, it becomes more difficult for a police officer to visually look at a car and a plate, or whatever the vehicle may be, and determine whether or not that plate may, in fact, belong on that vehicle". (App. 57) Since the words "Live Free or Die" are barely larger than 1/2" in size and the true identifying letters and numbers are approximately 2" and 2-7/8" respectively, in size, logic dictates that any law enforcement officer would identify the plate as belonging to a passenger vehicle from the larger identifying letters and numbers prior to clearly viewing the motto. As to distinguishing plates from other states with similar colors, the fact is that stamped at the bottom of the plates in plain view are the words "New Hampshire."

is the "coin of the realm" – not of the individual. It is a mechanism for purchasing commodities in the market place and does not impute a controversial belief to the individual. Even if an individual felt so strongly about the national motto that he insisted on removing the motto from every coin in his possession, he would not be criminally liable. Liability to prosecution for obliterating the motto requires an intent to defraud. *United States v. Sheiner*, 273 F. Supp. 977 (S.D.N.Y. 1967) *aff'd.* 410 F.2d 337 (2nd Cir.) *cert. denied* 396 U.S. 825 (1969); *Barnett v. United States*, 384 F.2d 848 (5th Cir. 1967); *United States v. Lissner*, 12 F.2d 840 (Mass. 1882).

The district court found it unnecessary to decide whether the third element of *O'Brien* was satisfied because it held that the restriction on the Maynards' First Amendment activity was greater than essential to the furtherance of the State's interest in motor vehicle identification. If the State's interest is to distinguish certain passenger cars from other vehicles, it is not necessary to use code words to accomplish this objective. The State's aim could be achieved by more precise and narrow means, namely, placing the words "Passenger" or "Non-commercial" on the plates, and the State would lose nothing by it. Thus, even if Professor Ely's thesis were accepted that the state need not adopt means which are less efficient, that would have no application here.

V.

The Maynards have a right to be free from any required affirmation of belief under the First Amendment and may not be compelled to display the state motto on their private property.

Since the federal district court upheld the Maynards' contention that their acts constituted constitutionally protected symbolic speech, it did not consider their further contention that they have a right under the First Amendment to be free from compelled affirmations of belief.[43] The appellants have chosen not to brief this argument, but rely instead on the New Hampshire Supreme Court's decision in *State v. Hoskin, supra.* There, the court apparently took judicial notice of the fact that words and devices on license plates are not regarded as statements of the car owner and that the presence of the motto does not presume endorsement of the message. (App. Br. 18).

Every man has a right to be free to form his own beliefs and to communicate those beliefs to others. Under our constitution, no man, no group of men, nor any branch of government may force another to adopt prescribed beliefs, nor compel a man to declare a belief he does not hold. Mr. Justice Jackson, speaking for this Court in *West Virginia State Board of Education v. Barnette, supra,* stated:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics,

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[43]Judge Bownes would have also rested the decision on this ground. 406 F. Supp. at 1396 n.9.

nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." [Footnote omitted.]

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." 319 U.S. at 642.

As in *Barnette* the freedom asserted by the Maynards "does not bring them into conflict with rights asserted by any other individual." *Barnette*, 319 U.S. at 630. "Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual." *Id.*

Taken in combination, RSA 263 and 262:27-c force citizens of New Hampshire to profess a belief and foster a point of view that many disagree with. The Maynards object to advertising a belief they find repugnant. Because their objections to the motto are based on their religious beliefs, they find the requirement that they display the motto especially oppressive, and that oppression grates on them on a continuing basis.[44]

[44]To some extent justifications for freedom of speech duplicate those for religious freedom. Occasionally, the courts have considered the interests closely intertwined. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Murdock v. Penna.*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Biklen v. Board of Education*, 333 F. Supp. 902, 906 n.6 (N.D.N.Y. 1971) *aff'd* 406 U.S. 951 (1972). Nevertheless, they embody distinct interests. Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. at 336. Appellees' complaint stated a separate cause of action for the free exercise claim and the argument is briefed separately here.

The State argues, on the basis of *State v. Hoskin*, *supra*, that everybody knows that display of the motto is required by the State and that therefore it carries no implication of endorsement. This stands *Barnette* on its head. The issue is not what viewers might think but, rather, whether it is offensive to the Maynards to advertise the slogan. It could be said of the flag salute and pledge of allegiance that since everyone knows it is required, its recital is of no moment. The whole point of *Barnette* is that the state cannot require its citizens to affirm a creed with which they disagree. The State may not compel acquiescence "by word or act." *Id.* 642. *See Goetz v. Ansell*, 477 F.2d 636, 638 (2d Cir. 1973); *Russo v. Central School District No. 1*, 469 F.2d 623, 626 (2d Cir. 1972). As the court said in *Barnette*, "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind left it open to public authorities to compel him to utter what is not in his mind." 319 U.S. at 634. That is precisely the situation here.[45]

[45]Cases sustaining the constitutionality of loyalty oaths are not germane. *See, e.g., Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971); *Bond v. Floyd*, 385 U.S. 116 (1966); *American Communications Association v. Douds*, 339 U.S. 382 (1950) (equally divided Court); *Biklen v. Board of Education*, 333 F. Supp. 902 (N.D.N.Y. 1971) *aff'd.* 406 U.S. 951 (1972); *Knight v. Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd. per curiam*, 390 U.S. 36 (1968). A loyalty oath requiring public employees to support the ideals of our Constitution is far different than a law requiring a private citizen to proselytize the view that one should "Live Free or Die." Also, the threatened criminal penalties in this case (imprisonment not to exceed one year and a fine of one thousand dollars) are in no way comparable to the loss of a teaching post. *Biklen*, 333 F. Supp. at 906. Finally, Article VI,

(continued)

In view of the State's concession that it is possible to serve its interests without utilizing the motto on license plates (App. Br. 24), it is clear that the Maynards' right to be free from a required affirmation of belief must prevail.[46]

VI.

The prohibition against taping over the state motto as applied to the Maynards violates the Free Exercise Clause of the First Amendment.

The Maynards' refusal to display the State motto is based upon their most deeply held religious beliefs. The truth of these beliefs must be accepted (Note 5, *supra*). This Court has repeatedly held that the First

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(footnote continued from preceding page)
Cl.3 of the Constitution itself mandates that all legislative, executive and judicial officers take an oath to support the Constitution. There is no similar requirement with regard to the state motto. As Mr. Justice Douglas said, concurring in *Speiser v. Randall*, 357 U.S. 513, 536 (1958):

> "All public officials - state and federal - must take an oath to support the Constitution by the express command of Article VI of the Constitution*** But otherwise the domains of conscience and belief have been set aside and protected from government intrusion. *Board of Education v. Barnette*, 319 U.S. 624."

[46]The fact that there may be alternative means available to the Maynards to express their dissent from the motto is immaterial. *Spence*, 418 U.S. at 411 n.4; *See Cohen v. California*, 403 U.S. 15 (1971); *Schneider v. State*, 308 U.S. 147, 163 (1939).

Amendment freedoms are closely intertwined. "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas v. Collins*, 323 U.S. 516, 531 (1945). *Accord Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971); *Schneider v. Smith*, 390 U.S. 17, 25 (1968). While there is considerable overlap, the issues are still analytically distinct. In fact, the notion that a person should not be compelled to speak what is not in his mind would seem to be more compelling when his belief touches on sensitive questions of faith. When the state violates a man's religion or conscience it often works an exceptional injury to him which, unless compelled by most pressing social needs, "constitutes a moral wrong in and of itself, far more than would the impairment of his freedoms of speech, press or assembly." Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 327, 337 (1969).

The purpose of the Free Exercise Clause is "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963). "And even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims." *Gillette v. United States*, 401 U.S. 437, 842 (1971); *Sherbert v. Verner, supra.*

Thus, in *Sherbert v. Verner, supra*, this Court held that a state cannot withhold unemployment compensation from a worker who was discharged because of her refusal to work on Saturdays in violation of her religious beliefs. Such a course, if it were permitted,

would require the worker "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404. *Accord Lincoln v. True*, 408 F. Supp. 22 (W.D. Ky. 1975). The Maynards are in the same predicament: Their ability to operate their car in New Hampshire is conditioned on their abandoning their conscientious opposition to the State motto. In the absence of a compelling State interest, the individual's religious views should be accommodated. *Sherbert v. Verner*, 374 U.S. at 403; *NAACP v. Button*, 371 U.S. 415, 438 (1963).[47]

It has been suggested that when, because of compelling conscientious belief, an individual refuses to perform any duty of positive action established by the State, the individual claiming the protection of the Free Exercise Clause should be aided by a presumption that the State can "satisfy its needs either by performing the act on his behalf or by placing upon him an alternative

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[47]In judicial proceedings, the courts respect the rights of those who have conscientious scruples against oath taking by permitting them to make affirmation in any mode which they declare to be binding upon their consciences. The dual purposes of the oath are to impress the witness with the solemnity of the occasion and to safeguard against perjury. These objectives can be served equally as well without offending the witness' religious convictions.

By the same token, the vital function of a system of autombile registration is to identify motor vehicles in case of accident or violation of law and to secure the efficient collection of revenue. *Bosen v. Larrabee*, 91 N.H. 492, 23 A.3d 331, 332 (1941). These objectives are served whether or not the motto is displayed on the license plate. The ancillary objectives of promoting pride, etc. are of lesser stature and should not take precedence over an individual's religious preferences.

burden of equal weight, or both." Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. at 345. Only if the presumption is overcome should the balancing of interests be resorted to. *Id.* This standard should be applied in the instant case. The Maynards have indicated their willingness to purchase special plates from the State without the State motto. It takes the State between ten to thirty days to make "vanity plates" on special order at an extra cost of $5.00. It would be possible to remove the die that says "Live Free or Die." (App. 55-56) Thus, the presumption favoring the individual could not be overcome on this record.

If this test is not adopted, the court must weigh the competing interests of the parties. Balancing the interests of the Maynards *vis a vis* the State of New Hampshire is made easier in this case by the State's concession that it could establish a workable motor vehicle registration system without utilizing the State motto on license plates. (App. Br. 24) While the articulated State interests themselves might be considered weighty, the necessity of using the State motto is not, and the impact that an exemption for religious reasons would have on the overall regulatory program is slight. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1390 (1967).

Against the State's interest must be contrasted the "sincerity and importance of the religious practice for which special protection is claimed and the degree to which the governmental regulation interferes with that practice." *Id.* The sincerity of the appellees has been resolved in the district court. The requirement that they display the words "Live Free or Die" on their private

automobiles compels the Maynards to be active participants in the dissemination of a creed to which they are religiously opposed. The Maynards live their lives to serve Jehovah. Jehovah is a preserver of life. They believe that life is more important than freedom. They believe that the gift God gives is everlasting life and that humans who serve Jehovah will attain everlasting life. The creed that they feel compelled to endorse, *i.e.*, that one should "Live Free or Die," is directly opposed to the precepts of their religion.

CONCLUSION

For the foregoing reasons, the judgment of the district should be affirmed.

Respectfully submitted,

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Appendix A

TRANSCRIPT OF PROCEEDINGS

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

NEAL R. WOOLEY, individually and as Chief of Police, Lebanon, New Hampshire; PAUL A. DOYON, individually and as Director of the New Hampshire State Police; FREDERICK N. CLARKE, JR., individually and as Commissioner of the New Hampshire Department of Motor Vehicles, Appellants.	)	
v.	)	Civil Action No. 75-57
GEORGE MAYNARD AND MAXINE MAYNARD, Appellees.	)	

Transcription of Plaintiff's Exhibit No. 3

December 6, 1974
Lebanon, N.H.

(Preceding material inaudible.)

The defendant, GEORGE MAYNARD, after having been first duly sworn, made the following statement:

DEFENDANT: If the Court permits, may I have a recording here of my statement, if I may. I don't have an opportunity to have a stenographer here at this time,

and so I would like to record my testimony for my future references if I may.

JUDGE: That is what you're going to testify to now?

DEFENDANT: Yes, sir.

JUDGE: That's all right.

DEFENDANT: If I may mention to your honor my reason for taking the tape off, taping up the the number plate, is that I felt my Christian conscience had been bothering me. The thing is, your honor, I've been born in this country, I received an inheritance. And this inheritance of religion, of language, and also country, which is of none of my choice, but it was an inheritance through my parents.

When I grew up I found out that this inheritance became contaminated in these different fields. In other words, just like if I inherit a well from great grandparents, I will not drink from it if it becomes contaminated because I inherit it.

And so, I'm studying the Bible, I found that life is very precious and is a gift from God. And therefore the inheritance that I received from my parents was also death, sickness, and disease. And it showed that it has no purpose in life if the ultimate is vanity.

And so in studying the Bible I found out that Jehovah God has a purpose for us, a new inheritance, which is not corruptible. And therefore, by studying the Bible, which I have with me, it states that this means everlasting life, they're taking the knowledge of the only true God, the one who sent forth Jesus Christ.

And so my conviction –

JUDGE: Well, let me interrupt you for just a minute. What you are stating in the court is that, by reason of some religious belief, this is why you did this. Is that correct?

DEFENDANT: Yes, sir, your honor. The thing is that I'm not a voter of – I'm not a supporter of this government, of this system. My allegiance is to God. And therefore I do not support the political system of this country. I abide by the laws. As the authority you, your honor, are in the authoritative position permitted by God. And therefore, I have to be subjected to you. So when the laws of man conflict with God's laws, then I have to obey God rather than man. And therefore, the slogan Die–Live Free or Die, is against my teaching and my belief. Because life is more valuable than freedom, to me. Whereas the slogan says, either live free or die.

And I teach otherwise. Man is made to live forever. Man is not made to die. So therefore I can't support the slogan that the state has put on the motor vehicle.

JUDGE: Well, I understand what you're saying as far as by reason of your religious beliefs, you took this action on your own here, and it's not –

DEFENDANT: I'm not – I'm not –

JUDGE: – that you want to necessarily disobey the law, but you can't live with that, and the fact that your religion is such.

DEFENDANT: Yes, sir, that is correct. I'm not representing here any particular group. I'm making my own personal plea in my own defense of my conscience. The other Jehovah Witnesses may feel otherwise.

JUDGE: All right, all right. What I want you to understand is, I'm a constitutional officer as well. I'm obliged to do what I'm sworn to do.

DEFENDANT: Yes, sir.

JUDGE: And I don't make those laws.

DEFENDANT: Yes, sir.

JUDGE: All I do is interpret them, and try to give everybody a fair trial here in applying the law to the facts of each case.

DEFENDANT: Yes, sir.

JUDGE: And the law is set forth by the legislature. They tell me what's right and what's wrong. If somebody disobeys it, why, if the facts are such that they come within the framework of that law, then I have to apply that law to them.

DEFENDANT: I see.

JUDGE: And as a matter of fact, I had a case similar to this which went to the Supreme Court direct from this court. In the case *State vs. Hoskin*, 1972, and it's reported in volume 112 N.H. page 332, in which the Supreme Court of our state said this: defendant who placed tape over the state motto on their license plate thereby preventing it from being seen, violated RSA Chapter 262:27-c, misuse of plates. The Supreme Court has directed this law to every judge in the state.

DEFENDANT: Yes, sir.

JUDGE: And it said that anybody who tapes over those words, that motto, is, in fact, violating the law.

DEFENDANT: I realize that sir.

JUDGE: So that's what we're all here for. And I can respect your position, respect your right to worship God as you see fit to do. But I don't want to delay the proceedings of this court, as long as I understand what your defense is. And what you're telling me is that by reason of your –

DEFENDANT: My conscience.

JUDGE: – religious –

DEFENDANT: Conscience.

JUDGE: – conviction and your principle, is that right?

DEFENDANT: Well, the state is denying me the freedom of speech by passing a law, because it's somebody else's convictions.

JUDGE: All right. So I understand it. I think I've got all the facts correctly here. And I've explained to you what the law is.

DEFENDANT: Yes, sir.

JUDGE: Are there any questions you want to ask the witness?

DEFENDANT: One more point, your honor. If the state of New Hampshire insists on this law, what they're doing, they're putting themselves above God. Because I give my allegiance and my pledge to God. And therefore if the state wishes to cause a hardship on my Christian conscience –

(End of proceedings as recorded.)